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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 750 35

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ROBERT L. GORDON, DIRECTOR OF LABOR, PETITIONER,

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JANUARY 15, 1946.

CERTIORARI GRANTED FEBRUARY 25, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

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[fols. 1-6] **IN SUPREME COURT OF ILLINOIS**

No. 28474

PEOPLE ex Rel. FRANCIS B. MURPHY, Director of Labor of the State of Illinois, Appellee,

vs.

CHICAGO WASTE AND TEXTILE COMPANY, a Corporation, et al., Defendants;

On Appeal of CARTER H. HARRISON, Collector of Internal Revenue, First District of Illinois, Appellant

Appeal, Circuit Court, Cook County, 42C 8910

[fol. 7]

Abstract of Record from Circuit Court of Cook County— Filed November 27, 1944

COMPLAINT—Filed June 29, 1942

Complaint filed on the 29th day of June, 1942, alleges:

(1) That at all times hereinafter mentioned, plaintiff herein was and is now a sovereign body politic.

(2) That Francis B. Murphy is the Director of Labor of the Department of Labor of the State of Illinois; that as such he is an officer of the State Government of the State of [fol. 8] Illinois, provided for by the Civil Administrative Code, being "An Act in Relation to the Civil Administration of the State Government," approved March 7, 1917, as amended; that the Director of Labor of the State of Illinois is the Administrator of the Illinois Unemployment Compensation Act, as amended, and that the aforementioned Francis B. Murphy is the duly appointed, confirmed, qualified and acting Director of Labor of the Department of Labor of the State of Illinois.

(3) That the defendant, Chicago Waste & Textile Co., a corporation, had in its employ one or more individuals performing services for 1 in the State of Illinois, subsequent to June 30, 1937.

(4) That said defendant, Chicago Waste & Textile Co., a corporation, had in employment 6 or more individuals on some portion of a day within each of twenty or more calendar weeks in the year 1941.

(5) That in accordance with the Illinois Unemployment Compensation Act, as amended, there accrued and became payable by the defendant, Chicago Waste & Textile Co., a corporation, to the Director of Labor of the State of Illinois, contributions in a sum equal to 2.7% with respect to wages payable for employment occurring during the years 1938, 1939 and 1940, and 2.7% with respect to wages paid for employment occurring during the year 1941 and thereafter. That pursuant to Section 18 (a) (3) of the aforesaid Illinois Unemployment Compensation Act, as amended, interest has accrued upon such contributions at the rate of 1 per cent per month from the respective dates upon which such contributions became payable.

[fol. 9] (6) That Section 18 (a) (4) of the aforementioned Illinois Unemployment Compensation Act, as amended, provides in part as follows:

"(4) Penalties. Any employer who shall fail to file a report of wages paid to each of his workers for any period in the manner and within the time required by the provisions of this Act or the Rules and Regulations of the Director, or if the Director shall pursuant to such regulations extend the time for filing such report shall fail to file such report within such extended time, shall, in addition to any sum otherwise payable by him under the provisions of this Act, pay to the Director as a penalty a sum equal to 2 per cent of the contributions payable by such employer for such period, for each month or part thereof of such failure to file such report, provided that such penalties shall not exceed 10 per cent of the amount of such contributions."

That the defendant, Chicago Waste & Textile Co., a corporation, failed to file reports as required by the Director of Labor and the provisions of the Illinois Unemployment Compensation Act, as amended, for third and fourth calendar quarters of 1941 on or before the dates such contribution reports were due and that the Director of Labor of the State of Illinois did not extend the time for filing such contribution reports.

(7) That pursuant to the power vested in him by the Illinois Unemployment Compensation Act, the Director of Labor of the State of Illinois did on to-wit, the 30th day of October, 1937, adopt Regulation No. 2 as amended, which provides as follows:

"(a) Contributions for the six consecutive months beginning July 1, 1937, shall become due, and be paid, on or before the last day of January, 1938. On and after January 1, 1938, contributions shall become due and shall be paid [fol. 10] quarterly on or before the last day of the month next following the calendar quarter for which such contributions have accrued; except that any employer who is delinquent in filing a contribution report or in paying his contributions for any calendar quarter may be required to report and to pay contributions on a calendar month basis. (The calendar quarters above referred to are three-month periods ending March 31, June 30, September 30 and December 31.)"

(8) That in accordance with the provisions of Section 18 of the Illinois Unemployment Compensation Act, as amended, and Regulation No. 2 as adopted by the Director of Labor on October 30, 1937, effective October 30, 1937, as amended, it became the duty of the defendant, Chicago Waste & Textile Co., a corporation, to pay to the Director of Labor, contributions with respect to wages for employment occurring in the year 1938 and thereafter, quarterly, on or before the last day of the month next following the calendar quarter for which contributions accrued.

(9) That the claim of the Director of Labor of the State of Illinois is admitted by the defendant, Chicago Waste & Textile Co., a corporation; that said defendant has admitted its indebtedness for contributions to be as follows:

Period	Wages	Contributions	Interest at 1% Per Month From:	Penalties
1st quarter 1941	2,394.00	—		
2nd " 1941	3,466.89	—		
3rd " 1941	7,517.75	202.98	11-24-41	12.18
4th " 1941	10,281.13	277.59	2-1-42	16.62
1st " 1942	9,552.61	257.92	5-1-42	—
		$738.49		$28.80

[fol. 11] (10) That the liability for such contributions and the amount thereof is based upon reports filed by the defendant, Chicago Waste & Textile Co., a corporation.

(11) That demand for payment of said delinquent contributions, together with interest thereon at the rate of 1 per cent per month from the respective dates upon which said contributions were payable, and for the payment of the penalties due for failure to file contribution reports as above set forth, has been made upon the defendant, Chicago Waste & Textile Co., a corporation, by the Director of Labor of the State of Illinois, but no part of said delinquent contributions, interest or penalties has been paid by the defendant, Chicago Waste & Textile Co., a corporation, or by anyone on its behalf, and said indebtedness is still a valid and subsisting obligation due and owing by the defendant, Chicago Waste & Textile Co., a corporation, to the Director of Labor of the State of Illinois.

(12) That pursuant to Section 26 of the Illinois Unemployment Compensation Act, as amended, which provides as follows:

"(a) A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become due. In all cases where [fol. 12] a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that determination and assessment of the Director made pursuant to the provisions of this Act became final."

There exists a continuing lien in favor of the Director of Labor of the State of Illinois upon all of the personal

property or rights thereto owned by the defendant, Chicago Waste & Textile Co., a corporation, on the 1st day of May, 1941, and used by it in connection with its trade, occupation, profession or business, and upon all such personal property or rights thereto, thereafter acquired by said defendant, Chicago Waste & Textile Co., a corporation. That such lien is for a sum equal to the amount of contributions, interest and penalties due from the defendant, Chicago Waste & Textile Co., a corporation, as above set forth.

(13) That on to-wit, the 3rd day of April, 1942, the Director of Labor of the State of Illinois caused to be filed with the Recorder of Deeds of Cook County in the State of Illinois, a notice of lien for contributions incurred by the aforementioned defendant, Chicago Waste & Textile Co., a corporation, for the third calendar quarter of 1941 which said notice of lien dated the 3rd day of April, 1942, was recorded by the aforesaid Recorder of Deeds as Document No. 12869342, a true and correct copy of which is attached hereto and made a part hereof, marked Plaintiff's Exhibit "A."

(14) That on to-wit, the 8th day of May, 1942, the Director of Labor of the State of Illinois caused to be filed [fol. 13] with the Recorder of Deeds of Cook County in the State of Illinois, a notice of lien for contributions incurred by the aforementioned defendant, Chicago Waste & Textile Co., a corporation, for the fourth calendar quarter of 1941, which said notice of lien dated the 8th day of May, 1942, was recorded by the aforesaid Recorder of Deeds as Document No. 12889475, a true and correct copy of which is attached hereto and made a part hereof, marked Plaintiff's Exhibit "B."

(15) That on to-wit, the 20th day of May, 1942, the Director of Labor of the State of Illinois caused to be filed with the Recorder of Deeds of Cook County in the State of Illinois, a notice of lien for contributions incurred by the aforementioned defendant, Chicago Waste & Textile Co., a corporation, for the first calendar quarter of 1942, which said notice of lien dated the 20th day of May, 1942, was recorded by the aforesaid Recorder of Deeds as Document No. 12896060, a true and correct copy of which is attached hereto and made a part hereof, marked Plaintiff's Exhibit "C."

(16) That in accordance with the provisions of Section 26 of the Illinois Unemployment Compensation Act, as amended, it is the duty of the defendant, Chicago Waste & Textile Co., a corporation, to file in this proceeding, a full and complete schedule under oath, of all personal property and rights thereto which it owned at the time the aforementioned contributions became due or which it subsequently acquired, and to indicate upon such schedule the property so owned by it, which was or is used by it in connection with its trade, occupation, profession or business.

[fol. 14] (17) That Paragraph 26(d) of the Illinois Unemployment Compensation Act, as amended, provides as follows:

"(d) Priority of Lien. The lien herein created in favor of the director shall be prior to all other liens whether general or specific, and shall be inferior only to any claim for wages filed pursuant to 'An act to protect employees and laborers in their claims for wages' approved June 15, 1887, as amended, in an amount not exceeding $250.00 for work performed within six months from the date of filing such claim, and to such liens as shall attach prior to the filing of Notice of Lien by the Director with the Recorder of Deeds as provided in this Act; provided, however, that in all cases where statutory provision is made for the recordation or other public notice of a lien, the lien of the Director shall be inferior only to such liens as shall have been duly recorded, or of which public notice shall have been duly given, in the manner provided by such statute, prior to the filing of notice of lien by the Director with the Recorder of Deeds as in this Act provided."

(18) That the defendant, Associated Agencies, Inc., a corporation, claims to have some interest in the property herein being foreclosed by virtue of a judgment it obtained in the Municipal Court of Chicago, Case No. 4164524, against the defendant, Chicago Waste & Textile Co., a corporation, but that the interest of the aforementioned defendant, Associated Agencies, Inc., a corporation, is subordinate and inferior to that of the lien of the Director of Labor as herein set forth for the reason that the execution upon said judgment was issued long after notice of the lien of the Director of Labor was recorded with the Recorder

of Deeds as aforesaid, said execution being issued on to-wit, the 3rd day of June, 1942.

[fol. 15] (19) That there are certain other persons whose names are unknown to the plaintiff who do, or may, claim some interest in, or lien upon the property herein being foreclosed or some part thereof, either as holders of chattel mortgages, conditional sales contracts, agreements of consignment, trust receipts, bills of sale, or otherwise, but that the name or names of such person or persons are unknown to the plaintiff, wherefore all such persons are made parties defendant to this complaint by the name and description of "unknown owners."

(20) That the defendant, Associated Agencies, Inc., a corporation, has requested the defendant, Albert J. Horan, Bailiff of the Municipal Court of Chicago to levy upon and sell at public auction the personal property which is the subject of this foreclosure; that the aforementioned defendant, Albert J. Horan, Bailiff of the Municipal Court of Chicago, has served notice that he will hold such sale on the 29th day of June, 1942, and that unless the aforementioned defendant, Albert J. Horan, Bailiff of the Municipal Court of Chicago, and "unknown owners" are restrained by this Court from seizing and disposing of the aforementioned personal property, the plaintiff will be irreparably damaged.

(21) That the plaintiff is informed and believes and therefore states upon such information and belief that the aforesaid defendant, Chicago Waste & Textile Co., a corporation, is insolvent and that the personal property subject to the lien herein being foreclosed, is scant security for the debt due the Director of Labor of the State of Illinois and that unless a receiver be appointed for all of the said [fol. 16] property pending a full and complete hearing upon the issues herein, the plaintiff will suffer financial loss and said property will be wasted.

Wherefore plaintiff prays:

(a) That the Court grant, without notice or plaintiff's bond, the People's Writ of Injunction directed to the defendant, Chicago Waste & Textile Co., a corporation, Associated Agencies, Inc., a corporation, Albert J. Horan, Bailiff of the Municipal Court of Chicago, and "unknown

owners," their agents, employees, attorneys and all Creditors of the defendant, Chicago Waste & Textile Co., a corporation, enjoining and restraining the aforementioned defendants, their agents, employees, attorneys and each of them from wasting, dissipating, concealing, selling, assigning, transferring, disposing of, encumbering or in any way or manner intermeddling with any of the personal property now or heretofore owned by the defendant, Chicago Waste & Textile Co., a corporation, and restraining all creditors from bringing any proceedings or actions in law or in equity against the defendant, Chicago Waste & Textile Co., a corporation, which touch upon its personal property or rights thereto used in connection with its business, without first having obtained leave of this Honorable Court.

Plaintiff alleges that its rights will be unduly damaged and that the Director of Labor will suffer irreparable injury if the said injunction prayed for in this cause is not issued forthwith and without notice, good cause having been shown that said injunction should issue without plaintiff's bond; that if notice of application for injunction is [fol. 17] given to the aforementioned defendants there is grave danger that they will dispose of, or otherwise transfer, assign, encumber or conceal the property of the defendant, Chicago Waste & Textile Co., a corporation, and thereby defeat the purpose of said injunction.

(b) That an order be entered by this Honorable Court commanding that the defendant, Chicago Waste & Textile Co., a corporation, file within a short day to be fixed by the Court, a full and complete schedule under oath, of all personal property and rights thereto, which it owned on the 1st day of May, 1941, or thereafter acquired, and to indicate upon such schedule the property so owned by it which was or is used by it in connection with its trade, occupation, profession or business.

(c) That the defendant, Chicago Waste & Textile Co., a corporation, be directed to pay to Francis B. Murphy, Director of Labor, the sum of $738.49, together with interest at the rate of 1 per cent per month thereon as hereinabove set forth, and penalties in the sum of $28.80, plus the costs incurred in this proceeding, by a short day to be fixed by the Court and that in default thereof the property of the defendant, Chicago Waste & Textile Co., a corporation,

subject to the lien of the Director of Labor be sold to satisfy the amount so due; that in case of such sale the defendants and each of them and all persons claiming by or under them, may be forever barred and foreclosed of and from all right in or to the aforesaid property. That if the proceeds of such sale shall exceed the amount necessary to satisfy the claim of the Director of Labor and the costs of this proceeding, [fol. 18] the balance if any, shall be paid to such parties as the Court shall find to be entitled thereto.

(d) That in the event the aforesaid property or rights thereto shall not bring at such sale a sufficient sum to pay the amount due to the plaintiff, that the plaintiff have judgment against such defendants as the Court shall find to be liable for the payment of such deficiency.

(e) That a receiver be appointed for said property, and the rights thereto, upon the filing of this complaint, with the usual powers of Receivers in Chancery, to take and have immediate possession of said property, and to collect the rents, issues and profits arising out of said property, and disburse the same under the order and direction of this Court.

(f) And that said plaintiff may have such other and further relief in the premises as the Court may in equity and good conscience see fit to decree.

[fol. 19] EXHIBIT "A" TO COMPLAINT

Notice of Lien for Contributions under the Illinois Unemployment Compensation Act, attached to the complaint as Exhibit "A" in the following form:

State of Illinois
Department of Labor

Division of Placement and Unemployment Compensation
222 West North Bank Drive
Chicago

Notice of Lien for Contributions Under the Illinois Unemployment Compensation Act

Account No. 56289

Pursuant to Section 26 of the Illinois Unemployment Compensation Act, as amended, notice is hereby given that

there is due to the Director of Labor of the State of Illinois, from the following named employer:

Chicago Waste & Textile Co., Inc.
231 West Grand Avenue
Chicago, Illinois

contributions, together with interest and penalties thereon, as follows:

Period	Wages	Contribution Due	Interest	Penalties	Paid on Account	Balance Due
3rd Qtr. 1941	$7,517.75	$202.98	$10.35	$12.18	—	$225.51

plus additional interest upon the contributions set out above at the rate of 1% per month, or 1/30th of 1% per day, from the date of this notice until paid.

That, by virtue of the above named Section the amount of the aforesaid contributions, interest and penalties, together with such contributions, interest and penalties which may hereafter become due, are a lien, in favor of the Director of Labor of the State of Illinois, upon all the personal property or rights thereto, owned or hereafter acquired by the aforementioned employer, and used by it in connection with its trade, occupation, profession or business.

Francis B. Murphy, Director of Labor.

Dated this 3rd day of April, 1942.

[fol. 20] EXHIBIT "B" TO COMPLAINT

Notice of Lien for Contributions under the Illinois Unemployment Compensation Act, attached to the complaint as Exhibit "B" in the following form:

State of Illinois
Department of Labor

Division of Placement and Unemployment Compensation
222 West North Bank Drive
Chicago

Notice of Lien for Contributions Under the Illinois Unemployment Compensation Act

Account No. 56289

Pursuant to Section 26 of the Illinois Unemployment Compensation Act, as amended, notice is hereby given that there is due to the Director of Labor of the State of Illinois, from the following named employer:

Chicago Waste & Textile Co., Inc.
231 West Grand Avenue
Chicago, Illinois

contributions, together with interest and penalties thereon, as follows:

Period	Wages	Contribution Due	Interest	Penalties	Paid on Account	Balance Due
4th qtr. 1941	$10,281.13	$277.59	$9.08	$16.62	—	$303.29

plus additional interest upon the contributions set out above at the rate of 1% per month, or 1/30th of 1% per day, from the date of this notice until paid.

That, by virtue of the above named Section the amount of the aforesaid contributions, interest and penalties, together with such contributions, interest and penalties which may hereafter become due, are a lien, in favor of the Director of Labor of the State of Illinois, upon all the personal property or rights thereto, owned or hereafter acquired by the aforementioned employer, and used by it in connection with its trade, occupation, profession or business.

Francis B. Murphy, Director of Labor.

Dated this 8th day of May, 1942.

[fol. 21] EXHIBIT "C" TO COMPLAINT

Notice of Lien for Contributions under the Illinois Unemployment Compensation Act, attached to the complaint as Exhibit "C" in the following form:

State of Illinois
Department of Labor

Division of Placement and Unemployment Compensation
222 West North Bank Drive
Chicago

Notice of Lien for Contributions Under the Illinois Unemployment Compensation Act

Account No. 56289

Pursuant to Section 26 of the Illinois Unemployment Compensation Act, as amended, notice is hereby given that there is due to the Director of Labor of the State of Illinois, from the following named employer:

Chicago Waste & Textile Co., Inc.
231 West Grand Avenue
Chicago, Illinois

contributions, together with interest and penalties thereon, as follows:

Period	Wages	Contribution Due	Interest	Penalties	Paid on Account	Balance Due
1st qtr. 1942	$9,552.61	$257.92	$1.73	—	—	$259.65

plus additional interest upon the contributions set out above at the rate of 1% per month, or 1/30th of 1% per day, from the date of this notice until paid.

That, by virtue of the above named Section the amount of the aforesaid contributions, interest and penalties, together with such contributions, interest and penalties which may hereafter become due, are a lien, in favor of the Director of Labor of the State of Illinois, upon all the personal property or rights thereto, owned or hereafter acquired by the aforementioned employer, and used by it in connection with its trade, occupation, profession or business.

Francis B. Murphy, Director of Labor.

Dated this 20th day of May, 1942.

[fol. 22] ORDER OF WRIT OF INJUNCTION

Order of People's Writ of Injunction wherein it is ordered:

It Is, Therefore, Ordered that the People's Writ of Injunction issue without notice and without bond, directed to the defendant, Albert J. Horan, Bailiff of the Municipal Court of Chicago and to the defendant, Chicago Waste & Textile Co., a corporation, its agents, employees, attorneys, all creditors of said defendant and "unknown Owners" enjoining and restraining the defendant, Albert J. Horan, Bailiff of the Municipal Court of Chicago, "Unknown Owners" and the creditors of said defendant, Chicago Waste & Textile Co., a corporation, its agents, employees, attorneys, and each of them from wasting, dissipating, concealing, selling, assigning, transferring, disposing of, encumbering or in any way or manner intermeddling with any of the property, real or personal of said defendant, Chicago Waste & Textile Co., a corporation, and from in any manner interfering with the Receiver to be appointed herein in the discharge of his duties hereunder, or the property in his possession, or any of the estate, effects, assets, books, records or documents of said defendant, Chicago Waste & Textile Co., a corporation, and restraining all creditors and "Unknown Owners" from bringing any proceedings of any nature in any Court except the court in which this cause is now pending against the defendant, Chicago Waste & Textile Co., a corporation, until further order of this Court.

ORDER APPOINTING RECEIVER

Order appointing Maurice Klein receiver for the property of the Chicago Waste and Textile Company; to take immediate possession of said property, collect rents and to disburse same under order and direction of the Court.

ORDER DIRECTING RECEIVER TO APPOINT ATTORNEY

Order of Court directing Maurice Klein to employ J. R. Cohler as his attorney, and directing said receiver forthwith to take possession of the premises and the business, [fol. 23] property and assets contained therein located at 1234 North Halsted Street, Chicago, Illinois.

CLAIM OF THE UNITED STATES FOR FEDERAL INSURANCE CONTRIBUTION TAXES

Claim of the United States for Federal Insurance Contribution Taxes in the following form:

CLAIM OF THE UNITED STATES FOR TAXES IN THE CIRCUIT COURT OF ILLINOIS

No. 42 C 8910 Receivership

In the Matter of STATE OF ILLINOIS FOR THE USE OF FRANCIS B. MURPHY, vs. CHICAGO WASTE & TEXTILE COMPANY, INCORPORATED

STATE OF ——,
County of ——, ss:

Carter H. Harrison, Collector of Internal Revenue for the First District of Illinois, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1. That Chicago Waste & Textile Company, Incorporated, above named, is justly and truly indebted to the United States in the sum of $202.07 with interest thereon as hereinafter stated.

2. That the nature of said debt is internal revenue taxes due pursuant to law as follows:

Nature of Tax and Statute involved	Year or Taxable Period ended	Amount of Tax	With Interest at the rate of 6% per annum until paid. Interest began:
EMPLOYMENT TAX Federal Insurance Contributions Act	P. E. 3/31/42	$202.07	6/19/42
TOTAL: $202.07—Plus statutory interest. (SEE RIDER ATTACHED)			

3. That no part of said debt has been paid, but that the same is now due and payable at the Office of the Collector [fol. 24] of Internal Revenue at Chicago, Illinois.

4. That there are no set-offs or counterclaims to said debt.

5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or

belief, for its use, had or received any security or securities for said debt, except statutory liens.

6. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 6th day of October, 1942.

(Sgd.) Carter H. Harrison, Collector of Internal Revenue for the First District of Illinois.

Subscribed and sworn to before me this 6th day of October, 1942. (Sgd.) Mary R. Richartz, Notary Public.

Rider

Of the accounts herein claimed $95.53 was levied as a tax under Section 801 of Title VIII of the Social Security Act. Any sums so levied and deducted from wages by an employer under Section 802 of said Act, and any assets into [fol. 25] which any such sums have been converted, constitute in accordance with the provisions of Section 807 (c) of the Social Security Act, Section 607 of the Revenue Act of 1934 and Article 204 of Regulations 91 promulgated by the Commissioner of Internal Revenue, a special fund in trust for the United States. Demand is hereby made for the immediate payment and turnover of all such sums and other assets so held in trust for the United States which are or may come into the possession of the receiver, trustee, debtor in possession, executor, administrator, assignee or other fiduciary representative herein.

Amended Claim of the United States

Amended claim of the United States for Federal Insurance Contribution Taxes and Federal Unemployment Taxes in the following form:

Supplemental Claim of the United States for Taxes

In the Circuit Court of Illinois.

No. 42 C 8910 Receivership

In the Matter of State of Illinois for the Use of Francis B. Murphy,

vs.

Chicago Waste & Textile Company, Incorporated

State of Illinois,
County of Cook, ss:

Carter H. Harrison, Collector of Internal Revenue for the First District of Illinois, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1. That Chicago Waste & Textile Company, Incorporated, above named, is justly and truly indebted to the United States in the sum of $1,752.00 with interest thereon as hereinafter stated.

2. That the nature of said debt is internal revenue taxes due pursuant to law as follows:

[fol. 26]

Nature of Tax and Statute involved	Year or Taxable Period ended		Amount of Tax	With Interest at the rate of 6% per annum until paid. Interest began:
EMPLOYMENT TAX				
Federal Insurance	P. E.	6/30/41	Addl. $33.64	
Contributions Act		9/30/41	" 30.58	
" "		3/31/42	" 35.11	
" "		6/30/42	221.51	
Federal Unemployment	1941		831.43	
Tax Act	1942		599.73	

TOTAL: $1,752.00 Plus statutory interest.

THIS CLAIM SUPERSEDES AND CANCELS CLAIM FILED 10/15/42 in AMOUNT OF $1,467.53 (SEE RIDER ATTACHED)

AMENDED CLAIM

3. That no part of said debt has been paid, but that the same is now due and payable at the Office of the Collector of Internal Revenue at Chicago, Illinois.

4. That there are no set-offs or counterclaims to said debt.

5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens.

6. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims [fol. 27] of the United States in accordance with their priority.

Dated this 26th day of October, 1942.

(Sgd.) Carter H. Harrison, Collector of Internal Revenue for the First District of Illinois.

Subscribed and sworn to before me this 26th day of October, 1942. (Sgd.) Mary R. Richartz, Notary Public.

Rider

Of the accounts herein claimed $134.38 was levied as a tax under Section 801 of Title VIII of the Social Security Act. Any sums so levied and deducted from wages by an employer under Section 802 of said Act, and any assets into which any such sums have been converted, constitute in accordance with the provisions of Section 807 (c) of the Social Security Act, Section 607 of the Revenue Act of 1934 and Article 204 of Regulations 91 promulgated by the Commissioner of Internal Revenue, a special fund in trust for the United States. Demand is hereby made for the im-

mediate payment and turnover of all such sums and other assets so held in trust for the United States which are or may come into the possession of the receiver, trustee, debtor in possession, executor, administrator, assignee or other fiduciary representative herein.

INTERVENING PETITION OF CARTER H. HARRISON, COLLECTOR OF INTERNAL REVENUE

Intervening Petition of Carter H. Harrison, Collector of Internal Revenue, wherein it is alleged as follows:

1. That the said Collector has heretofore on, to-wit, the 9th day of October, 1942, filed a claim in these proceedings on account of the liability of the defendant herein to the United States of America for Employment Taxes under the Federal Insurance Contributions Act for the period ending [fol. 28] March 31, 1942, in the sum of $202.07, plus statutory interest thereon until paid.

2. And, further that the said Collector has heretofore on, to-wit, the 15th day of October, 1942, filed a supplemental claim for Employment taxes under the Federal Insurance Contributions Act for the period ended March 31, 1942, additional, and for the period ended June 30, 1942, and under the Federal Unemployment Tax Act for the years 1941 and 1942, all in the total sum of $1,467.53, plus statutory interest until paid.

3. And further, that the said Collector has heretofore on, to-wit, the 28th day of October, 1942, filed an Amended Claim for Employment Tax under the Federal Insurance Contributions Act for certain periods in the year 1941 for additional taxes and under the Federal Unemployment Tax Act for the years 1941 and 1942, all in the total sum of $1,742.99, plus statutory interest, which latter claim supersedes and cancels claim filed on October 15, 1942, as herein shown, in the amount of $1,467.53.

4. That no part of the claims filed herein as set out, has been paid.

5. That the defendant herein is insolvent and unable to pay and discharge in full all of its indebtedness.

6. That by virtue of the provisions of Section 3466 of the United States Revised Statutes, the aforesaid claims, filed

herein by the said Collector, are entitled to priority of payment immediately after expenses of administration and before payment is made to any of the creditors who have filed claims in these proceedings.

Wherefore, it is respectfully prayed that the said claims filed herein by the said Collector of Internal Revenue on account of the liability of the defendant herein to the United States of America for Employment Tax under the Federal Insurance Contributions Act and under the Federal Unemployment Tax Act in the total amounts of $202.07 and $1,742.00 respectively, be allowed in the full amounts for [fol. 29] which they were filed, plus statutory interest thereon until paid, and that said claims be allowed as claims entitled to priority of payment immediately after costs of administration and before payment to any of the creditors of the defendant herein, and for such other and further relief in the premises as to the Court shall seem meet.

Order granting leave to Carter H. Harrison to file instanter his verified petition as above and ordering that plaintiff and all parties of interest answer said petition within twenty days.

Answer of Director of Labor to Petition of Collector of Internal Revenue

Answer of Francis B. Murphy, Director of Labor, to Petition of Carter H. Harrison, Collector of Internal Revenue, wherein it is stated:

1. That this respondent admits that the said Carter H. Harrison, as Collector of Internal Revenue, filed a claim in these proceedings on the 9th day of October, 1942, on account of the liability of the defendant, Chicago Waste and Textile Company, a corporation, to the United States of America for employment taxes under the Federal Insurance Contributions Act for the period ending March 31, 1942 in the sum of $202.07, plus statutory interest thereon until paid.

2. And this respondent admits on, to-wit, the 15th day of October, 1942, said collector filed a supplemental claim for employment taxes under the Federal Insurance Contributions Act for the period ended March 31, 1942, additional, and for the period ended June 30, 1942, under the Federal

Unemployment Tax Act for the years 1941 and 1942, all in the sum of $1,467.53, plus statutory interest until paid.

3. And this respondent further answering, admits that the said collector on, to-wit, the 28th day of October, 1942, filed an Amended Claim for Employment Tax under the Federal Insurance Contributions Act for certain periods in the year 1941 for additional taxes and under the Federal [fol. 30] Unemployment Tax Act for the years 1941 and 1942, all in the total sum of $1,742.00, plus statutory interest, which latter claim supersedes and cancels claim filed on October 15, 1942, as herein shown, in the amount of $1,467.53.

4. And this respondent further answering, verily believes that no part of the claims filed herein by the said Collector Carter H. Harrison, as Collector of Internal Revenue, has been paid.

5. And this respondent further answering, admits that the defendant, Chicago Waste and Textile Company, a corporation, is insolvent and unable to pay and discharge in full all of its indebtedness.

6. This respondent denies that the claims filed by the said Collector are entitled to priority of payment under the provisions of Section 3466 of the United States Revised Statutes for the following reasons:

"(a) That this respondent has heretofore and to-wit, on the 29th day of June A. D. 1942, filed his complaint in equity for foreclosure of lien and the appointment of a receiver as will more fully appear from the complaint filed by this respondent for and on behalf of the People of the State of Illinois.

(b) That the defendant, Chicago Waste and Textile Company, a corporation, admitted its indebtedness in the sum of $738.49 and penalties amounting to $28.80 and in pursuance thereof, this respondent has caused the following liens to be filed with the Recorder of Deeds of Cook County in the State of Illinois, to-wit:

1. Notice of Lien filed April 3, 1942 for the third calendar quarter of 1941 as Document No. 12869342.

2. Notice of Lien filed on May 8, 1942 for the fourth quarter of 1941 as Document No. 12889475.

3. Notice of Lien filed on May 20, 1942 for the first calendar quarter of 1942 as Document No. 12896060.

[fol. 31] (c) That Paragraph 26(d) of the Illinois Unemployment Compensation Act, as amended, provides as follows:

"(d) Priority of Lien. The lien herein created in favor of the Director shall be prior to all other liens whether general or specific, and shall be inferior only to any claim for wages filed pursuant to 'An Act to protect employees and laborers in their claims for wages' approved June 15, 1887, as amended, in an amount not exceeding $250.00 for work performed within six months from the date of filing such claims, and to such liens as shall attach prior to the filing of Notice of Lien by the Director with the Recorder of Deeds as provided in this Act; provided, however, that in all cases where statutory provision is made for the recordation or other public notice of a lien the lien of the Director shall be inferior only to such liens as shall have been duly recorded, or of which public notice shall have been duly given, in the manner provided by such statute, prior to the filing of notice of lien by the Director with the Recorder of Deeds as in this Act provided."

(d) That this respondent caused a receiver to be appointed and the property of the defendant, Chicago Waste and Textile Company, a corporation, reduced to possession of said receiver and subsequently all personal property of said defendant was sold, with exception of certain property which was abandoned, in pursuance to an Order entered by this honorable court on July 23, 1942, thereby perfecting said liens and making them specific.

ORDER DIRECTING RECEIVER TO DEPOSIT BALANCE WITH CLERK AND APPROVING REPORT AND ACCOUNT OF RECEIVER

Order of Court ordering Receiver to deposit the balance of $677.81 with the Clerk of the Circuit Court of Cook County, subject to further order of Court; that the final report and account of the Receiver be approved and that said Receiver be discharged and liability on his bond terminated; that the Court reserves jurisdiction for the purpose

[fols. 32-33] of determining whether said monies so deposited with the Clerk shall be paid to the plaintiff or to the Collector of Internal Revenue, or shall be allocated between them.

ORDER DIRECTING THAT LIENS OF DIRECTOR OF LABOR BE GIVEN PRIORITY TO THE EXTENT OF 90% OF FUNDS ON DEPOSIT WITH CLERK AND THAT THE COLLECTOR OF INTERNAL REVENUE HAVE PRIORITY TO THE 10% REMAINING

Order of Judge Fisher as follows:

This matter coming up on hearing, and the Court being fully apprised of the premises herein, and having read the briefs filed and arguments made by opposing counsel with reference to the priority of the liens of the Director of Labor of the State of Illinois, over the claim of the Collector of Internal Revenue,

It Is Therefore Ordered, Adjudged and Decreed, that the liens of the Director of Labor of the State of Illinois, administrator of the Illinois Unemployment Compensation Act, be given priority to the extent of 90 per cent of the funds now on deposit with the Clerk of the Circuit Court, and that the Collector of Internal Revenue have priority as to the 10 per cent remaining.

Notice of Appeal of Carter H. Harrison, Collector of Internal Revenue.

Proof of service of Notice of Appeal.

Praecipe for Record and proof of service of Carter H. Harrison.

Affidavit of proof of service of Notice of Appeal and Praecipe for Record on Kanders-Steuber Company, Chicago, Illinois.

Certificate of Clerk of Circuit Court as to Transcript of Record.

J. Albert Woll, United States Attorney, Attorney for Appellant.

John B. Stephan, Assistant United States Attorney.

[fol. 34] IN SUPREME COURT OF ILLINOIS

EXCERPTS FROM APPELLEE'S BRIEF

And afterwards, to-wit: on the 6th day of January, A. D. 1945, the same being one of the days in vacation after the Term of Court aforesaid, there was filed in this office a certain brief of appellee the heading of Argument I on page eight being in the words and figures following, to-wit:

> The extension of the priority given by Section 191, Title 31, U. S. C. (referred to as Section 3466) to liens or claims for unpaid unemployment compensation contributions so as to deprive the State of such contributions is inconsistent with the intent of Congress as expressed in the Social Security Act of 1935, Second Deficiency Appropriation Act of 1938, Section 1601 of the Internal Revenue Act of 1939 and Sections 601 and 602 of the Revenue Act of 1943.

And, also heading of Argument III, appearing on page thirty-one of brief of appellee, which is in the words and figures following, to-wit:

> Appellant may not invoke Section 3466 because it has neither alleged or shown that Chicago Waste and Textile Company was insolvent in the manner intended by the statute.

And, also heading of Argument IV, appearing on page thirty-five of brief of appellee, which is in the words and figures following, to-wit:

> Since the lien of the Director of Labor became specific and perfected prior to the appointment of a receiver by the Circuit Court, which was the earliest possible time that Section 3466 could apply, the claim of the United States has no priority over that of the Director.

And, also heading of Argument V, appearing on page thirty-nine of brief of appellee, which is in the words and figures following, to-wit:

> The claim of the Director of Labor is a secured claim and as such has complete priority over the unsecured claim of the United States.

[fols. 35-36] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ARGUMENT AND SUBMISSION—March 20, 1945

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by John B. Stephan for appellant and by William C. Wines for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 37] IN THE SUPREME COURT OF ILLINOIS

Docket Nos. 28474, 28490.—Agenda 22—March, 1945

THE PEOPLE FOR THE USE OF FRANCIS B. MURPHY, DIRECTOR OF LABOR, Appellee,

v.

CHICAGO WASTE & TEXTILE COMPANY et al.—(CARTER H. HARRISON, COLLECTOR OF INTERNAL REVENUE, Appellant)

THE PEOPLE FOR THE USE OF FRANCIS B. MURPHY, DIRECTOR OF LABOR, Appellee,

v.

ADVERTISING REVIEW PUBLISHING COMPANY et al.—(UNITED STATES OF AMERICA, Appellant)

OPINION—May 23, 1945

MR. JUSTICE SMITH delivered the opinion of the court:

These cases have been consolidated for opinion in this court. The issues involved are such that each case must be considered separately in this opinion. We will first consider cause No. 28474. That case is an appeal by Carter H. Harrison, Collector of Internal Revenue, from an order of the circuit court of Cook county, denying his claim for priority of payment. The claim for which priority of payment is sought is the amount of Federal insurance contributiontaxes and Federal unemployment taxes due the Federal government from an insolvent employer. Appellee's claim as Director of Labor of the State of Illinois, against the same fund, is for unemployment compensation contributions, plus penalties, interests and costs due the State of Illinois. The amounts due both appellant and appellee accrued against Chicago Waste & Textile Company. A judgment was entered against that company in favor of one of its creditors in the municipal court of Chicago. An execution was issued and placed in the hands of the bailiff of the municipal court, whereupon appellee, as Director of Labor of the State of Illinois, on June 29, 1942, filed this suit in the circuit court of Cook county.

The purpose of the suit was to foreclose the tax lien for the unpaid unemployment compensation contributions due

the State, for appointment of a receiver and for an injunction restraining the sale of the property under the execution. Upon the filing of the complaint, a receiver was appointed, as prayed. Thereafter, the property was liquidated by the receiver. The net amount arising from the liquidation of the property was $677.81, which the court ordered deposited with the clerk of the circuit court, subject to the further order of the court. The claim of appellant and the claim of appellee were each in an amount in excess of the amount of the funds on deposit.

On November 16, 1942, appellant filed his intervening petition. In this intervening petition, after reciting the [fol. 38] filing of the claim in the cause on October 9, 1942, he alleged that by virtue of section 3466 of the Revised Statutes of the United States, his claim was entitled to priority of payment to the extent of the funds on deposit with the clerk. To this intervening petition, appellee filed his answer in which he denied that the claim of appellant was entitled to priority of payment. He alleged that there was due the State of Illinois from the insolvent employer for unemployment compensation contributions, the sum of $738.49, plus penalties; that said contributions were a lien on the property of the insolvent employer; that notice of the lien had been filed in the office of the recorder, as required by statute; that the lien for contributions due the State of Illinois was entitled to priority of payment over the claim of appellant and all other creditors.

Upon a hearing it was adjudged that appellee was entitled to priority to the extent of 90 per cent of the funds on deposit with the clerk, and that appellant was entitled to priority as to the remaining 10 per cent of such funds. To review that order, appellant, as Collector of Internal Revenue, perfected an appeal to the Appellate Court for the First District. On motion of appellee, the cause was transferred to this court on jurisdictional grounds.

Appellant claims the right of priority of payment of the taxes due the Federal government under section 1600 of the Federal Unemployment Tax Act (26 U. S. C. 1600; formerly title IX of the Social Security Act,) under section 3466 of the Revised Statutes of the United States (31 U. S. C. 191,) which provides that whenever any person indebted to the United States is insolvent, or his estate is insufficient to pay all his debts, the debts due to the United States shall be first satisfied.

Appellee claims that taxes due the Federal government under the Federal Unemployment Tax Act are not such debts as are comprehended within the provisions of said section 3466 of the Revised Statutes. Appellee further contends that even though the taxes due the Federal government in this case are debts due the United States within the purview of said section 3466, the State of Illinois has a prior lien on the assets of the taxpayer for the amount due the State under section 26(a) of the Unemployment Compensation Act of Illinois. Ill. Rev. Stat. 1943, chap. 48, par. 243.

In the view we take, it will not be necessary to decide either of the above questions raised by the parties in this particular case. Section 1600 of the Federal Unemploy-
[fol. 39] ment Tax Act (26 U. S. C. 1600) imposes an excise tax equal to 3 per cent of the total wages paid during each calendar year upon all employers having eight or more employees. Section 1601(a) (26 U. S. C. 1601(a)) of said act provides that the taxpayer may credit against the taxes imposed by section 1600, the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State, which is certified for the taxable year as provided in section 1603. The Illinois Unemployment Compensation Act was approved and certified by the Federal Social Security Board as provided in said section 1603. Section 1601(c) provides that the total amount of credits allowed "shall not exceed 90 per centum of the tax against which such credits are allowed." Section 1601(a)(3) provides that such credit shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required by section 1604 to file a return for such year "except that credit shall be permitted for contributions paid after such last day, but before July 1 next following such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last date." Section 1604 (26 U. S. C. 1604) fixes January 31, as the last day on which returns for the preceding calendar year shall be filed.

The claim of appellant is for taxes due the Federal government accruing in the years 1941 and 1942. The last due date of the return for the year 1941, under section 1604, was January 31, 1942. The last due date of the return for the year 1942 was January 31, 1943.

Section 602(b) of the Revenue Act of 1943 (26 U. S. C. 602(b),) provides: "Against the tax imposed by the Federal Unemployment Tax Act for the calendar year 1939, 1940, 1941, or 1942, any taxpayer shall be allowed credit for the amount of contributions paid by him into an unemployment fund under a State law, without regard to the date of payment, if the assets of the taxpayer were, at any time during the period from the last day upon which the taxpayer was required under section 1604 of the Federal Unemployment Tax Act to file a return of the tax against which credit is claimed to June 30 next following such last day, inclusive * * * in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction * * *."

[fol. 40] The record in this case shows that the receiver was appointed on June 29, 1942. The receiver qualified on June 30, 1942. This was prior to the expiration of the last day on which the taxpayer was entitled to a credit on the Federal taxes for the year 1941, for payments made to the State. The assets were, therefore, in the custody and under the control of a receiver during the period from the last day upon which the taxpayer was required to file a return of the tax against which credit is claimed and June 30 next following such last day, inclusive. Such assets were also in the hands of the receiver during all the time subsequent to that period. Under section 602(b) of the Revenue Act of 1943, all limitations as to the time of payment, when the assets were in the hands of a receiver, were removed. The receiver was, therefore, at any time after his appointment, entitled to pay contributions for the years 1941 and 1942 to the State and was entitled to credit on the taxes due the Federal government for the amounts paid to the State, up to 90 per cent of the taxes due the Federal government, for both years.

This brings us to a consideration of cause No. 28490. This case presents the questions on a different factual record from that presented by the record in cause No. 28474. This case is an appeal by the United States from a decree entered by the circuit court of Cook county. The appeal was also taken to the Appellate Court for the First District. On motion of appellee, the cause was transferred to this court on jurisdictional grounds.

The record shows that on January 9, 1939, Advertising Review Publishing Company made a general assignment of its assets and property to William Fisher, trustee, for the benefit of its creditors; that he had reduced the assets to cash and had remaining in his hands the net amount of $1253.11; that Carter H. Harrison, Collector of Internal Revenue, had filed claims with the trustee for capital stock tax and claims for taxes accruing under the Federal Unemployment Tax Act, aggregating more than the total amount of funds in the hands of the trustee. The Director of the Department of Labor of the State of Illinois also filed claims with the trustee for unemployment compensation contributions due the State of Illinois in the amount of $721.29, plus interest.

On February 11, 1942, Fisher, the trustee, filed his complaint in this cause in the nature of an interpleader, asking for instructions of the court as to the distribution of the funds in his hands. The Collector of Internal Rev- [fol. 41] enue and the Director of the Department of Labor of the State of Illinois were both made parties defendant. On April 2, 1943, the Director filed his complaint in the circuit court in equity for the purpose of foreclosing his lien on the assets in the hands of the trustee for the unemployment compensation contributions due the State of Illinois. These two cases were thereafter consolidated. On order of the court, the funds in the hands of the trustee were impounded with the clerk of the court to abide the result of the suit. On motion and by leave granted, the United States of America was substituted as a party to the suit in lieu of the Collector of Internal Revenue, and he was dismissed out of the case.

Upon a hearing, a decree was entered finding that the lien of the Director of Labor of the State of Illinois on the assets involved gave to him priority of payment to the extent of 90 per cent of the funds on deposit with the clerk and that the United States was entitled to priority of payment as to the remaining 10 per cent of said funds on deposit. From this decree the United States perfected the appeal.

What we have heretofore said in this opinion in disposing of cause No. 28474 has no application to this case, for the reason that the taxes involved in this case accrued in the year 1938 and prior years. The assets of the in-

solvent taxpayer were not in the custody or control of a receiver during any period mentioned in section 602(b) of the Federal Unemployment Tax Act, as enacted in the Revenue Code of 1943. The taxes with which we are here concerned were not subject to the provisions of that section.

Appellant claims the right of priority of payment of the taxes due the United States under the Federal Unemployment Tax Act because of the priority granted to the United States by section 3466 of the Revised Statutes of the United States (31 U. S. C. 191,) which reads as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent [fol. 42] debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Appellee, in an effort to demonstrate that it was not the intention of Congress that claims for taxes due under the Federal Unemployment Tax Act should be subject to the priority of payment provisions of said section 3466, has presented an interesting and illustrative argument. He has analyzed and presented both the State and Federal acts and their relations to each other. It is pointed out that the Federal act is not in itself a complete unemployment compensation law; that it merely provides for the collection of payroll taxes, but makes no provision for the payment of unemployment compensation to employees; that this function is left entirely to the States. It is further pointed out that section 902 of the Social Security Act of 1935, which is section 1601 of the Internal Revenue Code of 1939, allowed a credit against the Federal taxes imposed for payments made into an approved State unemployment compensation fund to the extent of 90 per cent of the amount of the taxes due under the Federal act, if such payments were made to the State fund before the last due date of the Federal return of the employer; that the last due date of such return was

January 31 of the year following that in which the wages were paid.

It is further pointed out that if payment of the State contributions was not made before the due date of the Federal return, and payment was made thereafter, but before June 30 next following such due date, a credit of 90 per cent of the credit, or 81 per cent, is allowed; that if the assets of the taxpayer are in the custody or control of a court of competent jurisdiction at any time between the last due date of the return and June 30 following, this limitation is removed and the full credit of 90 per cent is allowed; that by the Revenue Act of 1940, such limitation on the time of the payment, in order to obtain the credit, was extended to December 6, 1940; that if the assets of the taxpayer were in the hands of a receiver at any time during the fifty-nine day period following December 6, 1940, and such State contributions were paid by the receiver during that time, he would be entitled to credit for the amount paid to the State, up to 90 per cent of the Federal taxes; that by the Revenue Acts of 1941 and 1943, this policy was continued and the limitations as to the time of payment, in order to obtain the credit, were further extended.

From this it is argued that the provisions relating to credits allowed on the Federal taxes for unemployment con- [fol. 43] tributions paid to the State, up to 90 per cent of the taxes due the Federal government, were intended to encourage the employer to promptly pay his State contributions; that it was not contemplated by Congress in the enactment of this legislation that more than 10 per cent of the 3 per cent Federal payroll taxes should belong to the Federal government; that the purpose of Congress in providing that 10 per cent of the Federal taxes be paid to the Federal government, regardless of the amount which the taxpayer might pay to the State, was to create a fund for the use of the Federal government in the administration of the Federal act and its supervision of the administration of the State acts by the several States.

From this it is said that in reality the Federal taxes are levied only for the purpose of co-ordinating the administration of the acts of the several States with the Federal act, under the supervision of the National government. It is further contended that the primary purpose of the Federal act was to encourage the States to pass State unemploy-

ment compensation acts and to assist the States in the administration of such acts.

Upon this basis it is contended that it was the intention of Congress that the Federal taxes, except as to the amount of 3/10 of one per cent of the payrolls were, in fact, levied for the use and benefit of the States and that, other than the 10 per cent for which no credit can be taken for the payments into a State unemployment compensation fund, the Federal government has no interest therein; that such 10 per cent reserved to the Federal government is for the sole purpose of defraying the expenses of administering the acts.

This argument, however plausible and logical it may seem, loses sight of the fact that the taxes imposed by the Federal act at the rate of 3 per cent on the payrolls of those employers having eight or more employees, are taxes imposed by, and which belong to, the Federal government. All of the provisions pointed out concerning credits for taxes paid into the unemployment compensation fund of the State relate to the administration of the act. They are administrative in character. By the Federal act, taxes are levied at the rate of 3 per cent on the payroll of every employer in the United States employing eight or more persons. The act was sustained by the Supreme Court of the United States in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 57 S. Ct. 883, because the payments exacted thereunder [fol. 44] were found to be taxes levied under the powers conferred on Congress by section 8 of article I of the constitution. Such payments were held to be excise taxes.

Under the act, therefore, excise taxes are levied by the Congress upon employers at the rate of 3 per cent of their payrolls. The fact that the act makes provision for a reduction in the amount of the taxes, or a surrender or waiver of a portion thereof, equal to the amount paid by the taxpayer into an approved State unemployment compensation fund, up to 90 per cent of the taxes due, does not change the character of the act as one levying or imposing taxes. The full amount of 3 per cent of the payroll constitutes taxes due the Federal government. The waiver of a portion thereof for the purpose of encouraging employers to promptly pay their State unemployment compensation contributions does not change the character of payments exacted by the Federal act. In the first instance, 100 per cent of the taxes levied constitute taxes due the Federal

government. The full amount continues to be taxes due the Federal government either until it is all paid to the Federal government, or 90 per cent is paid to the State and the balance to the Federal government. The provisions of the act for credits equal to the amount paid to the State, up to 90 per cent of the taxes due the Federal government, being administrative in character, do not change the character of the taxes imposed. They are still taxes due the Federal government and constitute a debt due to the United States within the purview of section 3466 of the Revised Statutes.

The cases cited and relied upon by appellee are not in point. Those cases involved payments due the United States of an entirely different character from those here involved. *United States* v. *Guaranty Trust Co.* 280 U. S. 478, 50 S. Ct. 212, involved money due the United States under the Transportation Act of 1920.

Mellon v. *Michigan Trust Co.*, 271 U. S. 236, 46 S. Ct. 511, involved a claim due the Director General of Railroads for transportation charges against an insolvent corporation. In *United States* v. *Marxen*, 307 U. S. 200, 59 S. Ct. 811, the claim was for money due the Federal Housing Administrator. In neither of those cases was the claim for taxes due the United States.

It has been repeatedly held by the Supreme Court that taxes due the United States are debts due the United States, within the meaning of section 3466 of the Revised Statutes. *Price* v. *United States*, 269 U. S. 492, 46 S. Ct. 180; *Beaston* [fol. 45] v. *Farmers' Bank*, 12 Pet. 102, 9 L. ed. 1017; *United States* v. *Bank of North Carolina*, 6 Pet. 29, 8 L. ed. 29.

Appellee also cites and relies on the case of *Rivard* v. *Bijou Furniture Co.* 67 R. I. 251, 21 Atl. 2d 563. It is true this case sustains the contentions of appellee. However, we think the court in that case overlooked the fact that taxes due under the Federal Unemployment Tax Act are taxes due the United States and, consequently, are debts due the United States within the scope of section 3466 of the Revised Statutes.

It is elementary that the priority given the United States by section 3466 cannot be impaired or superseded by State laws. *United States* v. *Oklahoma*, 261 U. S. 253, 67 L. ed. 638.

It follows that the claim of appellant was a debt due the United States from an insolvent debtor who had committed an act of bankruptcy under section 21 of chapter 3 of the Bankruptcy Act (11 U. S. C. 21,) by making a general assignment for the benefit of its creditors. Such claim was, therefore, entitled to priority of payment out of the assets of the insolvent debtor, unless the State of Illinois had such a lien on such assets as would remove them from the priority rights granted by section 3466 of the Revised Statutes.

It is claimed by appellee that he did have such a lien. This contention is based upon section 26(a) of the Unemployment Compensation Act of Illinois. (Ill. Rev. Stat. 1943, chap. 48, par. 243.) That section, in so far as material, reads as follows: "A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due."

It is contended by appellant that the lien given by this section of the statute is not a perfected, fixed lien; that at most it is merely an inchoate right to a lien. It will be remembered that the only thing done by the Director to establish or to enforce such lien, as against the property [fol. 46] of the debtor, was the filing of this suit on April 2, 1943, whereas the assignment was made by the insolvent debtor on January 9, 1939. The right to priority of payment under section 3466 attaches, if at all, at the time of the assignment.

In the very late case of *United States* v. *Waddill, Holland & Flinn*, in an opinion filed January 2, 1945, the Supreme Court of the United States had before it a similar question. (65 S. Ct. 304.) The case arose in Virginia. The debtor had made an assignment for the benefit of creditors. Claims were made by the United States for unpaid taxes under the Federal Unemployment Tax Act and for a debt arising out of a Federal Housing Administration transaction. The landlord of the debtor, twelve days after the assignment was made, obtained a distress warrant, which was levied on the

debtor's property. The applicable provisions of the statutes of Virginia gave to the landlord the right to levy distress for six months rent upon "any goods of the lessee * * * found on the premises, or which may have been removed therefrom not more than thirty days * * * for not more than six months rent." The distraining landlord claimed a lien on the property of the debtor and a priority of payment over the claim of the Federal government, based upon the lien given him by statute on the goods of the insolvent debtor. The Supreme Court of Virginia held that the provisions of the statute of that State, referred to, "give the landlord a lien which is fixed and specific and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment which are merely remedies for enforcement." In disposing of that question, the Supreme Court of the United States said:

"The words of section 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States. Thelusson v. Smith, 2 Wheat. 396, 425, 4 L. Ed. 271; United States v. Texas, supra, 314 U. S. at page 484; 62 S. Ct. at page 352, 86 L. Ed. 356. But this court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment. * * * It is within this suggested exception that the landlord and the municipality seek to bring [fol. 47] themselves. Once again, however, we do not reach a decision as to whether such an exception is permissible for we do not believe that the asserted liens of the landlord and the municipality were sufficiently specific and perfected on the date of the voluntary assignment to cast any serious doubt on the priority of the claim of the United States. * * *

"The Supreme Court of Appeals of Virginia has here held that these sections 'give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it.' 182 Va. at page 363, 28 S. E. 2d at page 746. It has also held that such a lien 'relates back to the beginning of the tenancy,' 182 Va. at page 364, 28 S. E. 2d at page 746, thus giving it force and effect on date of the voluntary

assignment. These interpretations of the Virginia statutes, as propositions of state law, are binding. But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supercede a longstanding Congressional Declaration of priority. * * *

"Tested by its legal effect under Virginia law, the landlord's lien in this instance appeared to serve 'merely as a caveat of a more perfect lien to come.' People of State of New York v. Maclay, supra, 288 U. S. at page 294, 53 S. Ct. at page 324, 77 L. Ed. 754. As of the date of the voluntary assignment, it was neither specific nor perfected. It gave the landlord only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof. * * *

"Nor was the statutory lien perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law. The tenant was divested of neither title nor possession by the silent existence of the landlord's statutory lien on the date of the assignment. Only after the lien was actually asserted and an attachment or a distraint levied, enabling the landlord to satisfy his claim out of the seized goods, could it be argued that such goods severed themselves from the general and free assets of the [fol. 48] tenant from which the claims of the United States were entitled to priority of payment. Prior to that time the lien operated to do no more than prevent the removal of goods from the premises by certain classes of persons, Va. Code par. 5524; and give the landlord priority in distribution under state law provided that the goods remained on the premises. Such a potential, inchoate lien could not disturb the clear command of section 3466 of the Revised Statutes. Something more than a 'caveat of a more perfect lien to come' was necessary."

It seems to us that the above language of the court is conclusive in this case. We are forced to the conclusion

that the taxes due the Federal government from the insolvent debtor in this case were debts due the United States within the purview of section 3466 of the Revised Statutes. It is equally clear that appellee did not have such a lien upon assets of the insolvent debtor, under section 26(a) of the Unemployment Compensation Act of Illinois, as to give him priority of payment over the claim of the Federal government. In view of this, appellant was entitled to priority of payment over the claim of the State of Illinois.

In cause No. 28474, the judgment of the circuit court is reversed and the cause is remanded to that court, with directions to enter an order directing the payment of the funds on deposit to the Director of the Department of Labor of the State of Illinois. The order will provide that the amount paid to the Director be credited on the claim of appellant against the insolvent debtor.

In cause No. 28490, the decree of the circuit court is reversed and the cause is remanded to that court, with directions to enter a decree finding that the United States is entitled to priority of payment to the extent of the funds on deposit, and ordering distribution accordingly.

Reversed and remanded, with directions.

[fols. 49-50] IN SUPREME COURT OF ILLINOIS

No. 28474

PEOPLE ex Rel. FRANCIS B. MURPHY, Director of Labor of the State of Illinois, Appellee,

vs.

CHICAGO WASTE AND TEXTILE COMPANY, a Corporation, et al.;

On Appeal of CARTER H. HARRISON, Collector of Internal Revenue, First District of Illinois, Appellant

Appeal from Circuit Court, Cook County, 42C 8910

JUDGMENT—May 23, 1945

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now,

being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.

Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid the judgment of the Circuit Court of Cook County in this behalf rendered, Be Reversed, Annulled, Set Aside and Wholly for Nothing Esteemed, and this cause be remanded to the Circuit Court of Cook County with directions to enter an order directing the payment of the funds on deposit to the Director of the Department of Labor of the State of Illinois. The order will provide that the amount paid to the Director be credited on the claim of appellant against the insolvent debtor.

[fols. 51-53] In the Supreme Court of Illinois

[Title omitted]

Notice of Intention to File Petition for Rehearing—Filed May 29, 1945

Carter H. Harrison, Collector of Internal Revenue for the First Collection District of Illinois, Appellant herein in the above entitled appeal, hereby serves notice of his intention to file a petition for rehearing in the above entitled cause.

J. Albert Woll, United States Attorney, Attorney for Appellant.

Received this — day of May, A. D. 1945, a copy of the Appellant's Notice of Intention to file Petition for Rehearing in the above entitled appeal.

George F. Barrett, Attorney General of the State of Illinois.

[fol. 54] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed June 16, 1945

MAY IT PLEASE THE COURT:

It is respectfully submitted that this Court should reconsider and revise its decision in the above entitled cause for the following reasons:

I

To the Extent that This Court Reversed the Ruling of the Lower Court Granting the Government 10% of the Fund, Because the State of Illinois Did Not Appeal

This is an appeal by Carter H. Harrison from an order of the Circuit Court of Cook County granting the the State of Illinois 90% of the funds on deposit and [fol. 55] the Collector of Internal Revenue 10% of said funds. The State of Illinois filed no cross appeal and therefore waived its right to request this Court to reverse the order of the lower court. The State of Illinois in its reply brief (p. 41) under the heading "Conclusion" respectfully urges "that the Order and Judgment of the Circuit Court of Cook County, Illinois, be affirmed". In view of the foregoing, it is respectfully urged that this Court erred in reversing the judgment of the lower Court and remanding the cause with directions to enter an order directing the payment of the entire fund on deposit to the Director of the Department of Labor of the State of Illinois.

II

No Consideration Has Been Given to the Fact That the Government's Claims Filed in the Lower Court Included Federal Insurance Contributions Taxes in the Amount of $522.91

In the proceedings in the lower Court the Government filed two claims totaling $1,954.07 plus interest (Abstract 17-20). Included in these claims was the sum of $522.91 due the Government for Federal Insurance Contributions Taxes for the period ending June 30, 1941 to the period ending June 30, 1942. No credit whatever is

allowed against Federal Insurance Contributions Taxes. They represent a tax of 1% withheld from employees' wages and 1% contributed by the employer, the total of which is payable direct to the Federal Government and disbursed only by the Government. The rider attached to both of the Government's claims (Abstract 18-21) states that the sum of $229.91 ($95.53 plus $134.38) has been deducted from wages by the employer and is a special fund in trust for the United States. It is there- [fol. 56] fore respectfully urged that Section 3466 of the Revised Statutes should be applicable to Federal Insurance Contributions Taxes against which the State has no interest or claim.

III.

Section 602 of the Revenue Act of 1943 Merely Extends the Time Within Which State Taxes May Be Paid and Credit Obtained. It Does Not Permit Credit Against Federal Unemployment Taxes Where the Fund Available Is Insufficient to Permit the Payment of State Taxes

Section 602 of the Revenue Act of 1943 was one of a number of amendments added to the Federal Unemployment Tax Act wherein by extending the time for obtaining credit for payments made to the State, the Federal Government sought to induce the taxpayer to pay delinquent Unemployment Taxes. The early amendments provided that credit might be obtained for payments made to the State if the assets of the taxpayer were in the control of a receiver appointed by the Court and the payment to the State was made within a specified period (usually 59 days). The latest amendment in this respect is Section 602(b) of the Revenue Act of 1943 which allows the taxpayer a credit for payments made to the State, without regard to date of payment, if the assets of the taxpayer are in the control of a receiver appointed by Court, between January 31 and June 30 following the year for which such taxes are due. It is respectfully submitted that where the fund available, as in this case ($677.81) is insufficient to pay the State tax ($738.49), the Federal priority under Section 3466 Revised Statutes attaches and does not permit the payment of State taxes. Payments made to the State under the Federal Act are in the nature of credits against the Federal tax

[fols. 57-58] and it was never contemplated that where the funds in the hands of the receiver were insufficient to pay the State in full that the State should receive the entire fund and the Government nothing.

Conclusion

For the reasons stated above, it is respectfully submitted that a rehearing should be allowed by this Court and that upon such rehearing the opinion of the Court be revised and the Circuit Court of Cook County, Illinois, be directed to enter an order,

(a) Directing that the funds on deposit be paid in full to the Collector of Internal Revenue

or in the alternative,

(b) Directing that claims of the Collector of Internal Revenue for Federal Insurance Contributions Taxes in the amount of $522.91 plus statutory interest be first paid and the balance remaining, if any, be paid, 90% to the Director of Labor of the State of Illinois and 10% to the Collector of Internal Revenue.

Respectfully submitted, Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, A. F. Prescott, C. Stanley Titus, Special Assistants to the Attorney General.

J. Albert Woll, United States Attorney, John B. Stephan, Assistant United States Attorney.

[fols. 59-60] In Supreme Court of Illinois

[Title omitted]

Order Denying Petition for Rehearing—September 17, 1945

And now on this day the Court having duly considered the Petition for Rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the Petition and denies a rehearing.

[fol. 61] IN SUPREME COURT OF ILLINOIS

Docket Nos. 28474, 28490. Agenda 22. March, 1945.

The People for the use of Francis B. Murphy, Director of Labor, Appellee, v. Chicago Waste & Textile Company et al. (Carter H. Harrison, Collector of Internal Revenue, Appellant), The People for the use of Francis B. Murphy, Director of Labor, Appellee, v. Advertising Review Publishing Company, et al. (United States of America, Appellant)

MODIFIED OPINION—September 17, 1945

Mr. Justice SMITH delivered the opinion of the court:

These cases have been consolidated for opinion in this court. The issues involved are such that each case must be considered separately in this opinion. We will first consider cause No. 28474. That case is an appeal by Carter H. Harrison, Collector of Internal Revenue, from an order of the circuit court of Cook county, denying his claim for priority of payment. The claim for which priority of payment is sought is the amount of Federal insurance contribution taxes and Federal unemployment taxes due the Federal government from an insolvent employer. Appellee's claim as Director of Labor of the State of Illinois, against the same fund, is for unemployment compensation contributions, plus penalties, interests and costs due the State of Illinois. The amounts due both appellant and appellee accrued against Chicago Waste & Textile Company. A judgment was entered against that company in favor of one of its creditors in the municipal court of Chicago. An execution was issued and placed in the hands of the bailiff of the municipal court whereupon appellee, as Director of Labor of the State of Illinois, on June 29, 1942, filed this suit in the circuit court of Cook county.

The purpose of the suit was to foreclose the tax lien for the unpaid unemployment compensation contributions due the State, for appointment of a receiver and for an injunction restraining the sale of the property under the execution. [fol. 62] Upon the filing of the complaint, a receiver was appointed, as prayed. Thereafter, the property was liquidated by the receiver. The net amount arising from the liquidation of the property was $677.81, which the court

ordered deposited with the clerk of the circuit court, subject to the further order of the court. The claim of appellant and the claim of appellee were each in an amount in excess of the amount of the funds on deposit.

On November 16, 1942, appellant filed his intervening petition. In this intervening petition, after reciting the filing of the claim in the cause on October 9, 1942, he alleged that by virtue of section 3466 of the Revised Statutes of the United States, his claim was entitled to priority of payment to the extent of the funds on deposit with the clerk. To this intervening petition, appellee filed his answer in which he denied that the claim of appellant was entitled to priority of payment. He alleged that there was due the State of Illinois from the insolvent employer for unemployment compensation contributions, the sum of $738.49, plus penalties; that said contributions were a lien on the property of the insolvent employer; that notice of the lien had been filed in the office of the recorder, as required by statute; that the lien for contributions due the State of Illinois was entitled to priority of payment over the claim of appellant and all other creditors.

Upon a hearing it was adjudged that appellee was entitled to priority to the extent of 90 per cent of the funds on deposit with the clerk, and that appellant was entitled to priority as to the remaining 10 per cent of such funds. To review that order, appellant, as Collector of Internal Reve- [fol. 63] nue, perfected an appeal to the Appellate Court for the First District. On motion of appellee, the cause was transferred to this court on jurisdictional grounds.

Appellant's claim is, in part, for taxes due under section 1600 of the Federal Unemployment Tax Act, and, in part, for Federal insurance contributions under section 801 of title VIII of the Social Security Act. We will consider first that part of the claim arising under the Federal Unemployment Tax Act.

Appellant claims the right of priority of payment of the taxes due the Federal government under section 1600 of the Federal Unemployment Tax Act (26 U. S. C. 1600; formerly title IX of the Social Security Act,) under section 3466 of the Revised Statutes of the United States (31 U. S. C. 191), which provides that whenever any person indebted to the United States is insolvent, or his estate is insufficient to pay all his debts, the debts due to the United States shall be first satisfied.

Appellee claims that taxes due the Federal government under the Federal Unemployment Tax Act are not such debts as are comprehended within the provisions of said section 3466 of the Revised Statutes. Appellee further contends that even though the taxes due the Federal government in this case are debts due the United States within the purview of said section 3466, the State of Illinois has a prior lien on the assets of the taxpayer for the amount due the State under section 26(a) of the Unemployment Compensation Act of Illinois. Ill. Rev. Stat. 1943, chap. 48, par. 243.

In the view we take, it will not be necessary to decide either of the above questions in connection with appellant's claim for priority as to the taxes due under the Federal Unemployment Tax Act. Section 1600 of the Federal Unemployment Tax Act (26 U. S. C. 1600) imposes an excise [fol. 64] tax equal to 3 per cent of the total wages paid during each calendar year upon all employers having eight or more employees. Section 1601(a) (26 U. S. C. 1601(a)) of said act provides that the taxpayer may credit against the taxes imposed by section 1600, the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State, which is certified for the taxable year as provided in section 1603. The Illinois Unemployment Compensation Act was approved and certified by the Federal Social Security Board as provided in said section 1603. Section 1601(c) provides that the total amount of credits allowed "shall not exceed 90 per centum of the tax against which such credits are allowed." Section 1601(a) (3) provides that such credit shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required by section 1604 to file a return for such year "except that credit shall be permitted for contributions paid after such last day, but before July 1 next following such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last date." Section 1604 (26 U. S. C. 1604) fixes January 31, as the last day on which returns for the preceding calendar year shall be filed.

The claim of appellant is for taxes due the Federal government accruing in the years 1941 and 1942. The last due

date of the return for the year 1941, under section 1604, was January 31, 1942. The last due date of the return for the year 1942 was January 31, 1943.

Section 602(b) of the Revenue Act of 1943 (26 U. S. C. 602 (b)), provides: "Against the tax imposed by the Federal Unemployment Tax Act for the calendar year 1939, [fol. 65] 1940, 1941, or 1942, any taxpayer shall be allowed credit for the amount of contributions paid by him into an unemployment fund under a State law, without regard to the date of payment, if the assets of the taxpayer were, at any time during the period from the last day upon which the taxpayer was required under section 1604 of the Federal Unemployment Tax Act to file a return of the tax against which credit is claimed to June 30 next following such last day, inclusive * * * in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction * * *."

The record in this case shows that the receiver was appointed on June 29, 1942. The receiver qualified on June 30, 1942. This was prior to the expiration of the last day on which the taxpayer was entitled to a credit on the Federal taxes for the year 1941, for payments made to the State. The assets were, therefore, in the custody and under the control of a receiver during the period from the last day upon which the taxpayer was required to file a return of the tax against which credit is claimed and June 30 next following such last day, inclusive. Such assets were also in the hands of the receiver during all the time subsequent to that period. Under section 602(b) of the Revenue Act of 1943, all limitations as to the time of payment, when the assets were in the hands of a receiver, were removed. The receiver was, therefore, at any time after his appointment, entitled to pay contributions for the years 1941 and 1942 to the State and was entitled to credit on the taxes due the Federal government for the amounts paid to the State, up to 90 per cent of the taxes due the Federal government, for both years.

This brings us to a consideration of cause No. 28490. This case presents the questions on a different factual record from that presented by the record in cause No. 28474. This [fol. 66] case is an appeal by the United States from a decree entered by the Circuit court of Cook county. The appeal was also taken to the Appellate Court for the First

District. On motion of appellee, the cause was transferred to this court on jurisdictional grounds.

The record shows that on January 9, 1939, Advertising Review Publishing Company made a general assignment of its assets and property to William Fisher, trustee, for the benefit of its creditors; that he had reduced the assets to cash and had remaining in his hands the net amount of $1253.11; that Carter H. Harrison, Collector of Internal Revenue, had filed claims with the trustee for capital stock tax and claims for taxes accruing under the Federal Unemployment Tax Act, aggregating more than the total amount of funds in the hands of the trustee. The Director of the Department of Labor of the State of Illinois also filed claims with the trustee for unemployment compensation contributions due the State of Illinois in the amount of $721.29, plus interest.

On February 11, 1942, Fisher, the trustee, filed his complaint in this cause in the nature of an interpleader, asking for instructions of the court as to the distribution of the funds in his hands. The Collector of Internal Revenue and the Director of the Department of Labor of the State of Illinois were both made parties defendant. On April 2, 1943, the Director filed his complaint in the circuit court in equity for the purpose of foreclosing his lien on the assets in the hands of the trustee for the unemployment compensation contributions due the State of Illinois. These two cases were thereafter consolidated. On order of the court, the funds in the hands of the trustee were impounded with the clerk of the court to abide the result of the suit. On motion and by leave granted, the United [fol. 67] States of America was substituted as a party to the suit in lieu of the Collector of Internal Revenue, and he was dismissed out of the case.

Upon a hearing, a decree was entered finding that the lien of the Director of Labor of the State of Illinois on the assets involved gave to him priority of payment to the extent of 90 per cent of the funds on deposit with the clerk and that the United States was entitled to priority of payment as to the remaining 10 per cent of said funds on deposit. From this decree the United States perfected the appeal.

The contention of appellee is that he was entitled to priority of payment to the extent of 81 per cent of the funds on deposit with the clerk under section 602(a) of the Reve-

nue Act of 1943. (26 U. S. C. 602(a).) Section 602(a), in so far as material to the present inquiry, is as follows:

"Section 602. Credit Against Federal Unemployment Taxes for Year 1936 to 1942.—(a) Allowance of Credit Against Tax for 1936, 1937, and 1938.—Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit (if credit is not allowable under section 902 of such Act) for the amount of contributions paid by him into an unemployment fund under a State law—

"(1) Without regard to the date of payment, to the extent hereinafter provided in this subsection;

"(2) Without regard to the date of payment with respect to wages paid after September 19, 1939;

"(3) Without regard to the date of payment, if the assets of the taxpayer were, at any time during the period August 11, 1939, to October 8, 1939, inclusive, or the period October 9, 1940, to December 6, 1940, inclusive, or the period September 21, 1941, to November 18, 1941, inclusive, in custody [fol. 68] or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

"The provisions of the Social Security Act in force prior to February 11, 1939, (except the provision limiting the credit to amounts paid before the date of filing returns), shall apply to allowance of credit under this subsection; except that the amount of credit against the tax for the calendar year 1936, 1937, or 1938, for contributions paid after December 6, 1940, shall not (unless the credit is allowable on account of paragraph (2) or (3) exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid before the last day upon which the taxpayer was required under section 905 of such Act to file a return for such year."

As we construe this section, it only removes the restriction as to the time of payment of taxes on wages accrued in the years 1936, 1937, and 1938, in cases where the assets of the taxpayer were in the custody or control of a receiver, trustee or other fiduciary appointed by, or under the control of a court of competent jurisdiction, during the

periods mentioned in paragraph (3) of subsection (a) of said section 602. As so construed, it has no application to the facts in this case. The assets of the insolvent taxpayer were not in the custody or control of a receiver during any period mentioned in section 602(a)(3) of the Revenue Act of 1943. The taxes with which we are here concerned were not subject to the provisions of that section.

Appellant claims the right of priority of payment of the taxes due the United States because of the priority granted to the United States by section 3466 of the Revised Statutes of the United States (31 U. S. C. 191,) which reads as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, [fol. 69] in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Appellee, in an effort to demonstrate that it was not the intention of Congress that claims for taxes due under the Federal Unemployment Tax Act should be subject to the priority of payment provisions of said section 3466, has presented an interesting and illustrative argument. He has analyzed and presented both the State and Federal acts and their relations to each other. It is pointed out that the Federal act is not in itself a complete unemployment compensation law; that it merely provides for the collection of payroll taxes, but makes no provision for the payment of unemployment compensation to employees; that this function is left entirely to the States. It is further pointed out that section 902 of the Social Security Act of 1935, which is section 1601 of the Internal Revenue Code of 1939, allowed a credit against the Federal taxes imposed for payments made into an approved State unemployment compensation fund to the extent of 90 per cent of the amount of the taxes due under the Federal act, if such payments were made to the State fund before the last due date of the Federal return of the employer; that the last due date of such return was January 31 of the year following that in which the wages were paid.

It is further pointed out that if payment of the State contributions was not made before the due date of the Federal return, and payment was made thereafter, but before June 30 next following such due date, a credit of 90 [fol. 70] per cent of the credit, or 81 per cent, is allowed; that if the assets of the taxpayer are in the custody or control of a court of competent jurisdiction at any time between the last due date of the return and June 30 following, this limitation is removed and the full credit of 90 per cent is allowed; that by the Revenue Act of 1940, such limitation on the time of the payment, in order to obtain the credit, was extended to December 6, 1940; that if the assets of the taxpayer were in the hands of a receiver at any time during the fifty-nine day period following December 6, 1940, and such State contributions were paid by the receiver during that time, he would be entitled to credit for the amount paid to the State, up to 90 per cent of the Federal taxes; that by the Revenue Acts of 1941 and 1943, this policy was continued and the limitations as to the time of payment, in order to obtain the credit, were further extended.

From this it is argued that the provisions relating to credits allowed on the Federal taxes for unemployment contributions paid to the State, up to 90 per cent of the taxes due the Federal government, were intended to encourage the employer to promptly pay his State contributions; that it was not contemplated by Congress in the enactment of this legislation that more than 10 percent of the 3 per cent Federal payroll taxes should belong to the Federal government; that the purpose of Congress in providing that 10 percent of the Federal taxes be paid to the Federal government, regardless of the amount which the taxpayer might pay to the State, was to create a fund for the use of the Federal government in the administration of the Federal act and its supervision of the administration of the State acts by the several States.

From this it is said that in reality the Federal taxes are levied only for the purpose of co-ordinating the administra- [fol. 71] tion of the acts of the several States with the Federal act, under the supervision of the National government. It is further contended that the primary purpose of the Federal act was to encourage the States to pass State unemployment compensation acts and to assist the States in the administration of such Acts.

Upon this basis it is contended that it was the intention of Congress that the Federal taxes, except as to the amount of 3/10 of one per cent of the payrolls were, in fact, levied, for the use and benefit of the States and that, other than the 10 per cent for which no credit can be taken for the payments into a State unemployment compensation fund, the Federal government has no interest therein; that such 10 per cent reserved to the Federal government is for the sole purpose of defraying the expenses of administering the acts.

This argument, however plausible and logical it may seem, loses sight of the fact that the taxes imposed by the Federal act at the rate of 3 per cent on the payrolls of those employers having eight or more employees, are taxes imposed by, and which belong to, the Federal government. All of the provisions pointed out concerning credits for taxes paid into the unemployment compensation fund of the State relate to the administration of the act. They are administrative in character. By the Federal act, taxes are levied at the rate of 3 per cent on the payroll of every employer in the United States employing eight or more persons. The act was sustained by the Supreme Court of the United States in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 57 S. Ct. 883, because of the payments exacted thereunder were found to be taxes levied under the powers conferred on Congress by section 8 of article I of the constitution. Such payments were held to be excise taxes.

Under the act, therefore, excise taxes are levied by the Congress upon employers at the rate of 3 per cent of their payrolls. The fact that the act makes provision for a reduction in the amount of the taxes, or a surrender or waiver of [fol. 72] a portion thereof, equal to the amount paid by the taxpayer into an approved State unemployment compensation fund, up to 90 per cent of the taxes due, does not change the character of the act as one levying or imposing taxes. The full amount of 3 per cent of the payroll constitutes taxes due the Federal government. The waiver of a portion thereof for the purpose of encouraging employers to promptly pay their State unemployment compensation contributions does not change the character of payments exacted by the Federal act. In the first instance, 100 per cent of the taxes levied constitute taxes due the Federal government. The full amount continues to be taxes due the Federal government either until it is all

paid to the Federal government, or 90 per cent is paid to the State and the balance to the Federal government. The provisions of the act for credits equal to the amount paid to the State, up to 90 per cent of the taxes due the Federal government, being administrative in character, do not change the character of the taxes imposed. They are still taxes due the Federal government and constitute a debt due to the United States within the purview of section 3466 of the Revised Statutes.

The cases cited and relied upon by appellee are not in point. Those cases involved payments due the United States of an entirely different character from those here involved. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 50 S. Ct. 212, involved money due the United States under the Transportation Act of 1920.

Mellon v. *Michigan Trust Co.* 271 U. S. 236, 46 S. Ct. 511, involved a claim due the Director General of Railroads for transportation charges against an insolvent corporation. [fol. 73] In *United States* v. *Marxen*, 207 U. S. 200, 59 S. Ct. 811, the claim was for money due the Federal Housing Administrator. In neither of those cases was the claim for taxes due the United States.

It has been repeatedly held by the Supreme Court that taxes due the United States are debts due the United States, within the meaning of section 3466 of the Revised Statutes. *Price* v. *United States*, 269 U. S. 492, 46 S. Ct. 180; *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 9 L. Ed. 1017; *United States* v. *Bank of North Carolina*, 6 Pet. 29, 8 L. Ed. 29.

Appellee also cites and relies on the case of *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, 21 Atl. 2d 563. It is true this case sustains the contentions of appellee. However, we think the court in that case overlooked the fact that taxes due under the Federal Unemployment Tax Act are taxes due the United States and, consequently, are debts due the United States within the scope of section 3466 of the Revised Statutes.

It is elementary that the priority given the United States by section 3466 cannot be impaired or superseded by State laws. *United States* v. *Oklahoma*, 261 U. S. 253, 67 L. Ed. 638.

As to that part of appellant's claim in case No. 28474 which is for Federal insurance contribution taxes, such taxes are not subject to the credits allowed under section

602(b) of the Revenue Act of 1943. It follows that the claim of appellant in cause No. 28499 and that portion of appellant's claim in cause No. 28474 which is for Federal insurance contribution taxes were debts due the United States and were entitled to priority of payment out of the assets of the insolvent debtors, unless the State of Illinois had such a lien on such assets as would remove them from [fol. 74] the priority rights granted by section 3466 of the Revised Statutes.

It is claimed by appellee that he did have such a lien. This contention is based upon section 26(a) of the Unemployment Compensation Act of Illinois. (Ill. Rev. Stat. 1943, chap. 48, par. 243.) That section, in so far as material, reads as follows: "A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due."

It is contented by appellant that the lien given by this section of the statute is not a perfected, fixed lien; that at most it is merely an inchoate right to a lien. It will be remembered that the only thing done by the Director to establish or to enforce such lien, as against the property of the debtor, was the filing of this suit on April 2, 1943, whereas, the assignment was made by the insolvent debtor on January 9, 1939. The right to priority of payment under section 3466 attaches, if at all, at the time of the assignment.

In the very late case of *United States* v. *Waddill, Holland & Flinn*, in an opinion filed January 2, 1945, the Supreme Court of the United States had before it a similar question. (65 S. Ct. 304.) The case arose in Virginia. The debtor had made an assignment for the benefit of cred- [fol. 75] itors. Claims were made by the United States for unpaid taxes under the Federal Unemployment Tax Act and for a debt arising out of a Federal Housing Administration transaction. The landlord of the debtor, twelve days after the assignment was made, obtained a

distress warrant, which was levied on the debtor's property. The applicable provisions of the statutes of Virginia gave to the landlord the right to levy distress for six months rent upon "any goods of the lessee * * * found on the premises, or which may have been removed therefrom not more than thirty days * * * for not more than six months rent." The distraining landlord claimed a lien on the property of the debtor and a priority of payment over the claim of the Federal government, based upon the lien given him by statute on the goods of the insolvent debtor. The Supreme Court of Virginia held that the provisions of the statute of that State, referred to, "give the landlord a lien which is fixed and specific and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment which are merely remedies for enforcement." In disposing of that question, the Supreme Court of the United States said:

"The words of section 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States. Thelusson v. Smith, 2 Wheat. 396, 425, 4 L. Ed. 271; United States v. Texas, supra, 314 U. S. at page 484; 62 S. Ct. at page 352, 86 L. Ed. 356. But this court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency [fol. 76] or voluntary assignment. * * * It is within this suggested exception that the landlord and the municipality seek to bring themselves. Once again, however, we do not reach a decision as to whether such an exception is permissible for we do not believe that the asserted liens of the landlord and the municipality were sufficiently specific and perfected on the date of the voluntary assignment to cast any serious doubt on the priority of the claim of the United States. * * *

"The Supreme Court of Appeals of Virginia has here held that these sections 'give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it.' 182 Va. at page 363, 28 S. E. 2d at page 746. It has also held that such a lien 'relates back to the begin-

ning of the tenancy,' 182 Va. at page 364, 28 S. E. 2d at page 746, thus giving it force and effect on date of the voluntary assignment. These interpretations of the Virginia statutes, as propositions of state law, are binding. But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority, given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by local statutory liens, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supercede a long-standing Congressional Declaration of priority. * * *

"Tested by its legal effect under Virginia law, the landlord's lien in this instance appeared to serve 'merely as a caveat of a more perfect lien to come.' People of State of New York v. Maclay, supra, 288 U. S. at page 294, 53 [fol. 77] S. Ct. at page 324, 77 L. Ed. 754. As of the date of the voluntary assignment, it was neither specific nor perfected. It gave the landlord only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof. * * *

'Nor was the statutory lien perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law. The tenant was divested of neither title nor possession by the silent existence of the landlord's statutory lien on the date of the assignment. Only after the lien was actually asserted and an attachment or a distraint levied, enabling the landlord to satisfy his claim out of the seized goods, could it be argued that such goods severed themselves from the general and free assets of the tenant from which the claims of the United States were entitled to priority of payment. Prior to that time the lien operated to do no more than prevent the removal of goods from the premises by certain classes of persons, Va. Code par. 5524, and give the landlord priority in distribution under state law provided that the goods remained on the premises. Such a potential, inchoate lien could not disturb the clear command of section 3466 of the Revised Statutes. Something more than a 'caveat of a more perfect lien to come' was necessary."

It seems to us that the above language of the court is conclusive in this case. We are forced to the conclusion that the taxes due the Federal government were debts due the United States within the purview of section 466 of the Revised Statutes. It is equally clear that appellee did not have such a lien upon assets of the insolvent debtor, under section 26(a) of the Unemployment Compensation Act of Illinois, as to give him priority of payment over the claim [fols. 78-79] of the Federal government for Federal insurance contribution taxes in cause No. 28474, or the claim of appellant in cause No. 28490. In view of this, appellant was entitled to priority of payment over the claim of the State of Illinois.

In cause No. 28474, the judgment of the circuit court is reversed and the cause is remanded to that court, with directions to enter an order directing the payment of the funds on deposit first to appellant for that portion of his claim which is for Federal insurance contribution taxes, with lawful interest thereon, and any balance remaining to the Director of the Department of Labor of the State of Illinois. The order will provide that the amount paid to the Director be credited on the claim of appellant against the insolvent debtor for unemployment compensation taxes.

In cause No. 28490, the decree of the circuit court is reversed and the cause is remanded to that court, with directions to enter a decree finding that the United States is entitled to priority of payment to the extent of the funds on deposit, and ordering distribution accordingly.

Reversed and remanded, with directions.

[fols. 80-81] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER RECALLING AND STAYING MANDATE—Filed October 17, 1945

On motion of Carter H. Harrison, Collector of Internal Revenue for the First Collection District of Illinois, by J. Albert Woll, United States attorney for the Northern District of Illinois, for an order to recall and stay the mandate in the above entitled action to and including December 16, 1945,

It Is Hereby Ordered that the mandate in the above entitled cause be recalled from the Circuit Court of Cook County, Illinois, and that said mandate be stayed to and including December 16, 1945.

Enter:

(S.) Francis S. Wilson, Justice of The Illinois Supreme Court.

October 16, 1945.

[fol. 82] In the Supreme Court of Illinois

[Title omitted]

Praecipe for Record for Use on Application to the Supreme Court of the United States for Writ of Certiorari—Filed Dec. 5, 1945.

The appellee in the above entitled cause hereby requests and directs you to prepare and duly certify a transcript of record in the above entitled cause and to include therein copies only of the following items:

1. Appellant's abstract of record.

2. Original opinion of the court, filed May 23, 1945.

3. Judgment of this court.

4. Notice of intention to file petition for rehearing.

5. Petition for rehearing.

6. Order denying petition for rehearing, with modifications.

[fol. 83] 7. Final opinion, including modifications ordered at the time of the denial of the petition for rehearing, filed September 17, 1945.

8. Second judgment rendered September 17, 1945, (if such judgment appears of record).

9. Order re stay of mandate.

10. Heading of Argument I which appears in bold face on page 8 of the Appellee's Brief in the Illinois Supreme Court.

11. Heading of Argument III, which appears in bold face on page 31 of Appellee's Brief in the Illinois Supreme Court.

12. Heading of Argument IV, which appears in bold face on page 35 of Appellee's Brief in the Illinois Supreme Court.

13. Heading of Argument V, which appears in bold face on page 39 of Appellee's Brief in the Illinois Supreme Court.

14. This praecipe for record, with proof of service.

15. Clerk's certificate.

George E. Barrett, Attorney General of the State of Illinois, Attorney for Appellee.

Proof of Service

Received a copy of the above and foregoing Praecipe for Record and proof of service thereof this 4th day of December, A. D. 1945.

J. Albert Woll, Attorney for Appellant. United States Attorney.

[fol. 84] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 85] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 16th, 1946.

Dated this 4th day of December, 1945.

Frank Murphy, Associate Justice of the Supreme Court of the United States.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1946

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 750

PEOPLE OF THE STATE OF ILLINOIS, ex rel. ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South LaSalle St., Chicago 4, Ill.
Attorney for Petitioner.

ALBERT E. HALLETT,
WILLIAM C. WINES,
Assistants Attorney General,
Of Counsel.

CHAMPION OREALY COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This is a petition by the State of Illinois for this court's writ of *certiorari* to review a judgment and opinion of the Supreme Court of Illinois, rendered in this cause on September 17, 1945. The Supreme Court of Illinois consolidated this case with a companion case involving similar but not identical issues, in which companion case *certiorari* is being sought concurrently by separate petition under the title "*People of the State of Illinois, ex rel. Robert L. Gor-*

don, Director of Labor, Petitioner v. The United States of America."

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

As more fully appears from the formal Statement of Questions Presented, required by this court's rules and appearing *infra,* pages 7-8, this case and the above entitled companion case present important questions, decided in favor of the United States Government by the Supreme Court of Illinois. The first of these issues was decided adversely to the United States Government by the Supreme Court of Rhode Island in the case of *Rivard* v. *Bijou Furniture Company,* 67 R. I. 251, 21 Atl. (2d) 563; 68 R. I. 358, 27 Atl. (2d) 853, in an opinion which the Supreme Court of Illinois expressly recognized as in point but declined to follow. These questions may be stated as follows:

In view of the intent of Congress as manifested in the Social Security Act and related legislation, does section 3466 of the Revised Statutes of the United States (Appendix, *infra,*) apply to give a claim of the United States for Social Security excise taxes a priority over the claim of a state for Unemployment Compensation contributions when such unemployment compensation contributions are exacted under a state statute adopted in accordance with the Congressional policy evinced by the Federal Act?

Was the claim of the State of Illinois for Unemployment Compensation contributions a secured claim and consequently entitled to priority over the unsecured claim of the United States for Social Security Excise taxes?

Because of the nationwide scope of the Federal Social Security Act and the State Social Security laws enacted by the forty-eight states as integral parts of the Federal program thereby established, these questions are of great importance not only to the State of Illinois and all employees within this state but to all states and all employees and to the Federal Government. This is particularly true at the present time in view of the currently unsettled employment situation prevailing throughout the country which throws an unprecedented burden upon the resources of the several states.

In addition, the instant case presents two additional questions, which are not involved in the companion case, which are as follows:

Was the debtor insolvent within the meaning of section 3466 of the Revised Statutes of the United States?

Was the state's lien for unemployment compensation contributions so far specific and perfected as effectively to exclude the funds in question from the estate of the debtor and thereby to defeat the Federal Government's right of access to such funds?

These questions emerge from facts which are not in dispute and are briefly stated as follows:

On June 29, 1942, the Director of Labor of the State of Illinois filed a complaint in the Circuit Court of Cook County, Illinois, to foreclose his statutory lien for unemployment compensation contributions (R. 1). The allegations of the complaint, which are undisputed, may be summarized as follows:

Chicago Waste and Textile Company, a corporation, hereinafter called the debtor, was an employer, subject to the Illinois Unemployment Compensation Act (R. 2). It

became indebted to the Director of Labor in the sum of $734.89, plus interest and penalties, for contributions due under the Act (R. 2-3). It admitted its indebtedness to the Director, and its liability for the said contributions and the amount thereof were based upon reports it had filed with the Director of Labor (R. 3-4).

Section 26(a) of the Illinois Unemployment Compensation Act created a lien in favor of the Director for a sum equal to the amount of contributions, interest and penalties due from the said debtor. Such lien attached to the personal property or rights used by the debtor in connection with its business (R. 4-5). Notice of the said lien was filed by the Director prior to May 21, 1942, in the office of the Recorder of Deeds of Cook County, Illinois (R. 5, 9-12).[1]

Associated Agencies, Inc. obtained a judgment against the debtor in the Municipal Court of Chicago, and execution upon such judgment was issued on June 3, 1942 (R. 6-7). Said Associated Agencies, Inc. requested the bailiff of the Municipal Court to levy upon and sell at public auction the personal property of the debtor which was subject to the Director's lien (R. 7). The bailiff served notice that he would hold such sale on June 29, 1942 (R. 7). The complaint of the Director of Labor prayed for an injunction to restrain the bailiff from selling the personal property of the debtor and for the appointment of a receiver (R. 7-9). The writ of injunction was granted and a receiver was appointed (R. 13).

On October 9, 1942 and October 28, 1942, Carter H. Harrison, Collector of Internal Revenue for the First District of Illinois, hereinafter referred to as the United States, filed claims for Federal unemployment taxes (more com-

[1] The provisions of the Illinois Unemployment Compensation Act relating to the lien of the Director are set forth in the Appendix, *infra*, pp. 44-48.

monly known as taxes under Title IX of the Social Security Act) in the sum of $1,431.16, plus interest, and Federal insurance contributions (more commonly known as taxes under Title VIII of the Social Security Act) in the sum of $522.91, plus interest (R. 14-18). Subsequently, on November 16, 1942 (R. 43), the United States filed an intervening petition in which it alleged that the debtor was insolvent and that the United States was entitled to priority of payment under the provisions of Section 3466 of the United States Revised Statutes (R. 18-19). In his answer to the intervening petition, the Director denied the contention of the United States and claimed priority under his lien (R. 19-21). The Circuit Court of Cook County subsequently approved the final report of the receiver and ordered him to deposit the balance of $677.81, remaining in his hands, with the Clerk of the Circuit Court, subject to the further order of the Court (R. 21-22). The Circuit Court later ordered that the lien of the Director be given priority to the extent of 90 per cent of the funds on deposit with the Clerk of the Circuit Court, and that the United States have priority as to the 10 per cent remaining (R. 22).

In the Supreme Court of Illinois, because of the similarity of certain issues, the case at bar was consolidated for opinion with the case of *The People, For the Use of Francis B. Murphy, Director of Labor, Appellee,* v. *Advertising Review Publishing Company, et al.,—(United States of America, Appellant)*—No. 28490 (R. 25, 42). Since the facts in the two cases are dissimilar and the case at bar has additional issues, separate petitions are being submitted to this Court. In its original opinion filed May 23, 1945, the Supreme Court of Illinois held that it was unnecessary in the case at bar to decide the various questions raised by the United States and the Director of Labor with

respect to Section 3466 of the United States Revised Statutes; that on the basis of the credit provisions of Section 602(b) of the Revenue Act of 1943 (26 U. S. C. 602(b)), the Director was entitled to the entire funds on deposit with the Clerk of the Circuit Court of Cook County, Illinois (R. 26-28). The United States filed a petition for rehearing (R. 39-41). On September 17, 1945, the Supreme Court of Illinois modified its previous opinion and held that under Section 3466 the United States was entitled to priority on that portion of its claim which was for Federal insurance contributions, plus interest, and any balance remaining was to be paid to the Director and credited against the claim of the United States for Federal unemployment taxes (R. 42-55).

The Supreme Court of Illinois denied petitioner's contentions that Section 3466 was inapplicable to a claim for unemployment compensation contributions and that petitioner's lien was specific and perfected so as to bar the priority of the United States under Section 3466. However, it grounded this decision on its view that it was constrained by this Court's pronouncements on questions of Federal law. It impliedly denied petitioner's contention that the debtor was not insolvent within the meaning of Section 3466.

B.

JURISDICTION.

The final decision of the Supreme Court of Illinois was rendered on September 17, 1945. The time for filing this petition and brief in support thereof was extended by this Court to January 16, 1946 (R. 57).

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

The court below held that under Section 3466 of the United States Revised Statutes the claim of the United States for Federal insurance contributions was entitled to priority over the claim of the State for unemployment compensation contributions. The applicability of Section 3466 was raised in every stage of the proceedings below. In its intervening petition in the Circuit Court of Cook County, Illinois, the United States contended that under Section 3466 its claim was entitled to priority over the claim of the petitioner for unemployment compensation contributions (R. 18-19). This was denied in petitioner's answer to said intervening petition (R. 20). The Circuit Court of Cook County in effect decided against the contention of the United States (R. 22). Priority under Section 3466 was again raised by the United States in its brief before the Illinois Supreme Court, and was denied and answered by petitioner in his brief (R. 23). The Supreme Court of Illinois passed upon the questions arising under Section 3466, presented by both the United States and the petitioner, and specifically allowed priority under Section 3466 to the United States on that portion of its claim for Federal insurance contributions (R. 42-55).

The questions presented are of substance, as will more fully appear under the reasons for granting the writ (*Infra*, pp. 8-11).

C.

QUESTIONS PRESENTED.

1. In view of the intent of Congress as manifested in the Social Security Act and related legislation, does section 3466 of the Revised Statutes of the United States apply to give a claim of the United States for Social Security excise taxes a priority over the claim of a state for Unemploy-

ment Compensation contributions when such unemployment compensation contributions are exacted under a state statute adopted in accordance with the Congressional policy evinced by the Federal Act?

2. Was the debtor insolvent within the meaning of section 3466 of the Revised Statutes of the United States?

3. Was the state's lien for unemployment compensation contributions so far specific and perfected as effectively to exclude the funds in question from the estate of the debtor and thereby to defeat the Federal Government's right of access to such funds?

4. Was the claim of the State of Illinois for Unemployment Compensation contributions a secured claim and consequently entitled to priority over the unsecured claim of the United States for Social Security excise taxes?

D.

REASONS FOR GRANTING THE WRIT.

1. The court below has decided Federal questions of substance not heretofore precisely determined by this court and has expressly recognized that its decision is in direct conflict with the decision of a court of last resort of a sister state.

An issue of the utmost importance to the Federal government and to all of the States is involved in this petition for review. Every State in the Union now has an unemployment compensation system which was established as a result of the enactment of Titles III and IX of the Social Security Act. As will be demonstrated in the accompanying brief, said Titles III and IX and every State unemployment compensation system are part and parcel of a National plan to promote the general welfare of the United

States and to serve the fiscal needs of the Federal Treasury. The contributions which the States collect under their unemployment compensation laws, and which are retained until needed in a separate trust fund in the Treasury of the United States, are used solely for the purpose of paying benefits to unemployed workers, thereby sustaining the National burden of unemployment and relieving the Federal Treasury of the terrific drains made upon it by unemployment relief. *Steward Machine Company* v. *Davis*, 301 U. S. 548, 574-576, 586-591.

It is, therefore, of paramount importance to determine whether the priority of the United States under Section 3466 may be invoked over the claim of a State for unemployment compensation contributions when such contributions are used solely to effectuate a clear Federal purpose, which Congress has unmistakably indicated is best served by the payment of contributions into State unemployment compensation funds. *Steward Machine Company* v. *Davis*, *supra*, p. 589. The issue has arisen in other States and will, undoubtedly, continue to be a subject of controversy until resolved by this Court. A conflict already exists between the decisions of the highest courts of Illinois and Rhode Island.

In *Rivard* v. *Bijou Furniture Company*, 67 R. I. 251, 21 Atl. (2d) 563, 68 R. I. 358, 27 Atl. (2d) 853, which involved the claim of the State of Rhode Island for unemployment compensation contributions and the claim of the United States for Federal insurance contributions and capital stock taxes, the Supreme Court of Rhode Island held that the claim of the State for unemployment compensation contributions was excluded from the purview of Section 3466. Since all State unemployment compensation laws have common objectives, there is no warrant for holding Section 3466 applicable in one State and inapplicable in another

State. Uniformity of decision is essential. A final adjudication by this Court would be equally in the interests of the Federal government. By applying for a stay of mandate on the ground that it intended to seek certiorari (R. 55-56), the United States has indicated that it is just as anxious as petitioner to elicit this Court's decision on a question of great import. It is, therefore, respectfully submitted that this case raises an issue of a very substantial nature which can be determined authoritatively only by this Court.

2. The court below has decided Federal questions of substance not in accord with applicable principles enunciated by this Court.

(a) The holding of the court below that Section 3466 is applicable to defeat the claim of a State for unemployment compensation contributions is in conflict with the principles expressed by this Court in *Steward Machine Company* v. *Davis*, 301 U. S. 548; *United States* v. *Marxen*, 307 U. S. 200; *United States* v. *Guaranty Trust Company of New York*, 280 U. S. 478; *Mellon* v. *Michigan Trust Company*, 271 U. S. 236; *Cook County National Bank* v. *United States*, 107 U. S. 445.

(b) The implied holding of the court below that the debtor was insolvent within the meaning of Section 3466 is in conflict with the decisions of this Court in *U. S.* v. *Oklahoma*, 261 U. S. 253; *Conrad* v. *Atlantic Insurance Company*, 1 Pet. 386; *Duparquet Company* v. *Evans*, 297 U. S. 216.

(c) The holding of the court below that petitioner's lien was not specific and perfected so as to bar the priority of the United States under Section 3466 is at variance with the expressions of this Court in *Thelusson* v. *Smith*, 2 Wheat. 396; *Spokane County* v. *United States*, 279 U. S.

80; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480; *United States v. Waddill*, 323 U. S. 353.

Each of the foregoing reasons for granting the writ is fully developed in the accompanying brief.

E.

CONCLUSION.

For the reasons stated, petitioner prays that the petition for a writ of *certiorari* be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The order of the Circuit Court of Cook County, Illinois, was entered without an opinion (R. 22). The opinion of the Supreme Court of Illinois (R. 42-55) is reported in 391 Ill. 29, 62 N. E. (2d) 537.

JURISDICTION.

The statement concerning jurisdiction is set forth in the Petition (*supra* pp. 6-7) and is incorporated herein by reference.

STATEMENT.

The statement of the case appears in the Petition (*supra* pp. 2-6) and is incorporated herein by reference. There is no dispute concerning the facts involved. Such facts as are relevant are set forth in such statement and the argument that follows.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Illinois erred:

1. In holding that the claim of the United States for Federal insurance contributions was entitled to priority under Section 3466 of the United States Revised Statutes over the claim of the petitioner for unemployment compensation contributions.

2. In holding that Section 3466 was applicable to defeat petitioner's claim for unemployment compensation contributions.

3. In holding that the debtor was insolvent within the meaning of Section 3466.

4. In holding that petitioner's lien was not specific and perfected so as to bar the priority of the United States under Section 3466.

5. In failing to hold that petitioner's secured claim was entitled to priority over the unsecured claim of the United States.

ARGUMENT.

I.

IN VIEW OF THE INTENT OF CONGRESS AS MANIFESTED IN THE SOCIAL SECURITY ACT AND RELATED LEGISLATION, SECTION 3466 OF THE REVISED STATUTES IS NOT APPLICABLE TO GIVE A CLAIM OF THE UNITED STATES FOR SOCIAL SECURITY EXCISE TAXES A PRIORITY OVER THE CLAIM OF A STATE FOR UNEMPLOYMENT COMPENSATION CONTRIBUTIONS, WHEN SUCH CONTRIBUTIONS ARE EXACTED UNDER A STATE STATUTE ADOPTED IN ACCORDANCE WITH THE CONGRESSIONAL POLICY EVINCED BY THE FEDERAL ACT.

This Court has repeatedly held that it will not apply Section 3466 where the concept of Federal priority is inconsistent with the intention of Congress, as manifested in other statutes. *United States* v. *Marxen*, 307 U. S. 200; *United States* v. *Guaranty Trust Company of New York*, 280 U. S. 478; *Mellon* v. *Michigan Trust Company*, 271 U. S. 236; *Cook County National Bank* v. *United States*, 107 U. S. 445. In each of the foregoing cases this Court held that, because of the nature of the legislation involved therein, Congress intended that the United States should not have priority under Section 3466.

The petitioner's claim for unemployment compensation contributions is predicated on a law which, like all other State unemployment compensation statutes, was enacted in furtherance of a paramount Federal policy. The character and origin of petitioner's claim stem from Title IX of the

Social Security Act. The purpose of Title IX, as we shall show was to create a National program of unemployment insurance by inducing every State in the Union to establish a system of unemployment insurance which would meet the minimum standards imposed by Congress. Through the agency of each State, Congress sought the imposition and collection of contributions to be used in the payment of benefits to unemployed workers. Such action by the States was deemed essential in order to promote the general welfare of the Nation and to serve the fiscal needs of the Federal Treasury by relieving it of the terrific drains made upon it by unemployment relief. *Steward Machine Company* v. *Davis,* 301 U. S. 548, 586-589, 591.

Although petitioner's claim for unemployment compensation contributions has been referred to as a claim of the State, it is in reality a claim of the Nation. In its relation to the welfare of the Country and the needs of the Federal Treasury, it is, unquestionably, tantamount to a claim of the United States. That Congress deemed the raising of revenue through the States for the relief of the unemployed to be of such tremendous National importance as to bar the application of Section 3466 is incisively demonstrated by (1) the exigencies which gave rise to a National program of unemployment insurance; (2) the provisions of Titles III, VII and IX of the Social Security Act; (3) the amendments to Title IX; (4) related legislation of Congress.

1. The critical conditions which gave rise to a national program of unemployment insurance.

These exigencies have been pertinently and graphically described by this Court. In *Steward Machine Company* v. *Davis, supra,* pp. 586-588, which involved the constitutionality of Title IX, this Court declared:

". . . there is need to remind ourselves of facts as to the problem of unemployment . . . During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than ten million; at times a peak was attained of sixteen million or more. Disaster to the breadwinner meant disaster to dependents . . . The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66, *Helvering* v. *Davis*, decided herewith. The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936, the states . . . incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,920,307,125, or twice the obligations of states and local agencies combined.

According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935 and 1936, the stupendous total of $8,681,000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train. . . . insofar as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation."

In *Helvering* v. *Davis*, 301 U. S. 619, 641, which involved an attack upon the constitutionality of Titles II and VIII of the Social Security Act (Old Age Benefits), this Court stated:

". . . The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co. supra,* has set the doubt at rest. . . ."

The national scope of the problem of unemployment was stressed by the President of the United States in his message to Congress on June 8, 1934[2] wherein he declared: "We are compelled to employ the active interests of the Nation as a whole through government in order to encourage a greater security for each individual who composes it. . . . If, as our Constitution tells us, the Federal government was established, among other things, to promote the general welfare it is our plain duty to provide for that security upon which welfare depends . . ."

Both branches of Congress emphasized that unemployment relief posed the most serious question for the Nation.[3]

2. Title IX of the Social Security Act.

To cope with the problem, Congress enacted Titles III, VII and IX of the Social Security Act (*Infra* pp. 34-44) Briefly, Title IX provides that every employer (with stated exceptions) of eight or more workers is to pay an annual excise tax, measured by wages. The taxpayer, however, is allowed a credit against the Federal tax for the amount of

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[2] Cong. Rec. Vol. 78, Pt. 10, p. 10770.

[3] Senate Report No. 628, 74th Congress, 1st Session, p. 10; House Report No. 615, 74th Congress, 1st Session, p. 7.

contributions paid into an unemployment compensation fund established under a State law, said credit not to exceed 90 per cent of the Federal tax.[4] Such credit is allowable only if the State law is periodically certified by the Social Security Board to the Secretary of the Treasury as satisfying certain minimum criteria (*Infra* pp. 39-41). Among these criteria, which will shortly be considered, is the requirement that the State law provide that the contributions paid into the State fund be promptly paid over to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." The Secretary of the Treasury is directed to invest the funds (except such portion as is, in his opinion, required to meet current withdrawals) in government securities. He is directed to pay out of the fund, to any competent agency, such sums as it shall duly requisition from the amount standing to its credit. The money withdrawn from the Unemployment Trust Fund by the State agency must be used solely for the payment of unemployment compensation benefits.

The plain purpose of the credit is to build up an adequate fund through the payment of contributions into State unemployment compensation systems, thereby sustaining the National burden of unemployment and safeguarding the Federal Treasury. To the extent that taxpayers make contributions to a State unemployment compensation fund, the drain upon the Federal Treasury is diminished. *Steward Machine Company* v. *Davis, supra,* pp. 589-591. The Federal tax and the credit are "approximate equivalents." *Steward Machine Company* v. *Davis, supra,* p. 591. The needs of the Federal Treasury can be cared for as well by payments of unemployment compensation contributions to the States as by payment of taxes to the United States.

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[4] The remaining 10 per cent is used in covering the costs of administering the State unemployment compensation systems. See *infra,* p. 20.

Rivard, et al. v. *Bijou Furniture Company*, 68 R. I. 358, 361, 27 Atl. (2d) 853, 855. That these principles were uppermost in the mind of Congress in extending the credit is apparent from an examination of the reports of both the Senate Finance Committee and the House Committee on Ways and Means.[5]

Moreover, Congress believed that the general welfare of the country would be better served by the payment of contributions into State unemployment compensation funds than by the payment of the tax to the Federal government. *Steward Machine Company* v. *Davis, supra*, p. 589.

As indicated, Title IX sets out certain criteria which the State law must satisfy before the taxpayer, who pays contributions under such a law, may avail himself of the credit. These criteria are manifestly designed to promote the fiscal policy of the Federal government by insuring that the State law under which the taxpayer makes his contributions is a genuine and workable unemployment insurance measure. If the State statute were merely masquerading as an unemployment compensation law and had been enacted to take advantage of the credit for some foreign purpose, the Federal fiscal policies which the credit is calculated to serve would be frustrated. *Steward Machine Company* v. *Davis, supra*, p. 593.

3. Titles III and VII of the Social Security Act.

To further encourage the State to establish unemployment compensation systems, Congress, in Title III of the Social Security Act, provided for grants to cover the administrative costs of such systems (Appendix, *infra*, pp. 34-35). The funds for such grants are derived from the

[5] Senate Report No. 628, 74th Congress, 1st Session, p. 15; House Report No. 615, 74th Congress, 1st Session, p. 16.

10% of the Federal tax which the Government retains for the purpose of meeting the costs of administering the State unemployment compensation systems.[6] However, as in Title IX, the State unemployment compensation laws are required to meet certain minimum criteria, intended to advance the fiscal policy of the United States (Appendix, *infra*, pp. 35-37).

That Congress assumed responsibility for the successful operation of the State unemployment compensation systems is evidenced not only by the standards which it prescribed in Titles III and IX and by its supervision of the "Unemployment Trust Fund" but also by the control which it has exercised through the activities of the Social Security Board which it created under Title VII of the Social Security Act (Appendix, *infra*, pp. 37-38). Through the Social Security Board, Congress has continuously reviewed State unemployment compensation legislation and administration to assure conformity with Federal standards, has determined and granted the amount of funds necessary for proper administration of State unemployment compensation systems, has guided the States in improving their legislation and administration, and has engaged in research designed to analyze the character of the problem of unemployment and to serve as a basis for

[6] Message of the President to Congress, January 17, 1935, Cong. Rec., Vol. 79, Pt. 1, p. 546; Hearings before the Senate Committee on Finance on S. 1130, 74th Cong., 1st Session, p. 112; Report of the President's Committee on Economic Security, p. 19; House Report No. 1855, 78th Congress, 2nd Session, p. 27; P. Douglas, Social Security in the United States (1936), pp. 146-148. ". . . administrative costs, if we judge from German and English experience, are likely to equal one-ninth of the benefits or one-tenth of the total costs. See my Standards of Unemployment Insurance, pp. 122-123. It was not by accident, therefore, but rather from the very structure of unemployment insurance itself that the federal government was authorized in Title IX to retain one-tenth of the tax on payrolls instead of for example one-twentieth or, as in the federal inheritance tax, two-tenths." Social Security in the United States, *supra*, footnote, p. 147.

the revision of legislation and administrative techniques dealing with that problem.[7]

4. Amendments to Title IX of the Social Security Act.

It must be emphasized that Title IX of the Social Security Act does not establish a system of unemployment compensation. No provision is made therein for the payment of benefits to unemployed persons. By the credit provisions of Title IX and the grants for administrative purposes in Title III, the States were induced to set up unemployment compensation systems to promote the general welfare of the Nation and to serve the fiscal needs of the Federal Treasury.

The heart of the unemployment compensation program is in the benefits which are paid by the States to unemployed workers and in the contributions which are collected by the States for the payment of such benefits. Time and time again, Congress has demonstrated that it is the payment of contributions to the States which advances the fiscal purposes of the Federal government. Although the credit against the Federal tax was originally allowed only if contributions to State funds were paid within a specified period of time, Congress has repeatedly amended Title IX so as to extend the credit to taxpayers who are delinquent in the payment of contributions, in order to induce them to pay their contributions to the States.[8]

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[7] The Social Security Board, Eighth American Scientific Congress, May 10-18, 1940.

[8] Section 1601, Internal Revenue Act of 1939; Section 701, Second Revenue Act of 1940; Section 701, Revenue Act of 1941; Section 602, Revenue Act of 1943.

5. Related Legislation.

The Social Security Act became law on August 14, 1935. The payment of Federal taxes under Title IX commenced in 1936. A number of the States did not enact their unemployment compensation laws until some time later. In the meantime, the employers in such States, who were subject to the Federal tax, paid the full amount of the tax to the National government. The intention of Congress to achieve the purposes of Title IX through the payment of contributions into State unemployment compensation systems rather than through the payment of taxes to the Federal government is strikingly revealed in its action, in which it turned over 90 per cent of the taxes collected from the foregoing employers to the State unemployment compensation systems which had been established subsequent to the initial payment of Federal taxes under Title IX.[9]

There is still further proof, if need be, of the deep concern which Congress has manifested in the maintenance and growth of State unemployment compensation funds. Congress has fully recognized that such funds would play a major role during the period of post-war readjustment and would serve as the first line of defense for the millions of workers employed in war industries who would be laid off and unemployed during industry's reconversion and readjustment to peace-time production. The Senate and the House appointed Special Committees on Post-war Economic Policy and Planning, which held extensive hearings on the problem of unemployment compensation in the

[9] Public Act 353, Ch. 755, 50 Stat. 754; Second Deficiency Appropriation Act 1938, Ch. 681, 52 Stat. 1148.

post-war period.[10] Interviews with representatives of important government and private agencies on post-war problems and plans disclosed that "The fear of unemployment after the war colors the thinking of all the agencies interviewed. Those concerned with the labor problems give it first rank in their planning."[11] As a result of the recommendations of the said Special Committees on Post-war Economic Policy and Planning,[12] Congress enacted legislation guaranteeing the solvency of State unemployment compensation funds.[13]

In view of the tremendous importance which Congress attached to the accumulation of unemployment compensation contributions by the States, it is inconceivable that Congress expected or desired the collection of such contributions to be impaired or jeopardized by the invocation of Section 3466. On the contrary, the legislative purposes underlying Titles III, VII and IX of the Social Security Act reflect an intention on the part of Congress to subordinate the operation of Section 3466 to the paramount interest of insuring the success of the National program of unemployment relief.

In holding that the claim of the petitioner was subordinate to the claim of the United States for taxes under Title VIII, the Supreme Court of Illinois looked to form, not substance, and disregarded the character and significance of petitioner's claim. In the light of what has already

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[10] Hearings before the Special Committee on Post-war Economic Policy and Planning, United States Senate, 78th Congress, Second Session, part 3, Unemployment Compensation; Hearings before the Special Committee on Post-war Economic Policy and Planning, House of Representatives, 78th Congress, Second Session, Parts 2 and 3, Economic Problems of the Transition Period.

[11] Senate Document No. 106, 78th Congress, 1st Session, p. 79.

[12] Senate Report No. 539, part 5, 78th Congress, 2nd Session, p. 6; House Report No. 1855, 78th Congress, 2nd Session, pp. 27-28.

[13] War Mobilization and Reconversion Act (50 U. S. C. A. App. 1667); Senate Report No. 565, 79th Congress, 1st Session, p. 2.

been said, it is unnecessary to labor the point that petitioner's claim serves a Federal purpose, that it is tantamount to a claim of the United States, and that it stems from Title IX of the Social Security Act.

Both Titles VIII and IX are parts of the same Act and are designed to effectuate a common purpose—the general welfare of the United States. ". . . the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis, supra,* p. 641. Congress deemed unemployment "an even more prevalent cause of dependency than old age; in fact . . . the most serious of all hazards confronting industrial workers. . . ."[14] Obviously, Congress did not intend that a claim for unemployment compensation contributions should be subordinated to a claim for taxes for old-age security.

It is important to note that in its oral argument before this Court in *Steward Machine Company* v. *Davis, supra,* p. 559, the United States contended that in imposing and collecting contributions under their unemployment compensation laws, the States were raising revenue for the general welfare of the United States; that the framers of the Constitution contemplated three different methods of raising revenue for the general welfare of the Nation. "The first was direct Federal taxation collected by Federal officers. The second was that the Federal government

[14] House Report No. 615, 74th Congress, 1st Session, page 7; Senate Report No. 628, 74th Congress, 1st Session, page 10.

lay the tax but the collection be by the State officers. The third method is that the States raise the revenue for the general welfare of the United States."

To invoke Section 3466 on the grounds that the revenue for old-age security is raised by the Federal government, whereas the revenue for unemployment relief is raised by the States, is totally devoid of merit and utterly foreign to the spirit and purpose of the Social Security Act. The clear-cut purpose and intention of Congress to treat unemployment relief as a Federal obligation and to assume the responsibility for the success of the unemployment compensation systems initiated under Title IX of the Social Security Act is not to be defeated by the sophistry of treating a claim for unemployment compensation contributions as a State claim as distinguished from a Federal claim.

II.

THE DEBTOR WAS NOT INSOLVENT WITHIN THE MEANING OF SECTION 3466 OF THE REVISED STATUTES.

Mere insolvency will not invoke the application of Section 3466. The insolvency contemplated therein must be manifested in one of the modes pointed out by the statute. *U. S.* v. *Oklahoma*, 261 U. S. 253, 259-262; *Conrad* v. *Atlantic Insurance Company*, 1 Pet. 386, 439.

Except when the estate of a deceased debtor is involved, Section 3466 applies only to three enumerated situations—(1) when the insolvent debtor makes a voluntary assignment of its property; (2) when the property of an absconding, concealed or absent debtor is attached by law; or (3) when an act of bankruptcy is committed. *U. S.* v. *Oklahoma, supra; Conrad* v. *Atlantic Insurance Company,*

supra; U. S. v. *Fisher,* 2 Cranch. 358, 390; *Beaston* v. *Farmers Bank,* 12 Pet. 102, 133-134, 138; *Kennebec Box Company, Inc.* v. *O. S. Richards Corp.,* 299 F. 871, 873; *Nolte* v. *Hudson Navigation Company,* 8 F. (2d) 859, 865-866.

The case at bar is not concerned with a voluntary assignment of property or with an absconding, concealed or absent debtor. Consequently, Section 3466 is inapplicable unless it is shown that the debtor committed an act of bankruptcy. Section 21, Chapter 3, Title 11, of the U. S. Code (11 U. S. C. A. 21) defines an act of bankruptcy as follows:

> "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; or (4) made a general assignment for the benefit of his creditors; or (5) while insolvent or unable to pay his debts as they matured, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."

The United States does not contend nor is there anything in the record to indicate that the debtor committed an act of bankruptcy as defined under clauses (1), (2), (4) or (6) of the above provision.

Clauses (3) and (5) must, therefore, be considered. Clause (3) applies to a person who suffers or permits, "while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings. . . ." The lien of a judgment against personal property arises at the time the execution is placed in the hands of the bailiff for levy. (Ch. 77, Sec. 9, Ill. Rev. Stat., 1943.) Such execution was placed with the bailiff for levy sometime prior to the filing of petitioner's foreclosure suit (R. 7). In order to show that the debtor committed an act of bankruptcy under clause (3), the United States was required to establish that the debtor was insolvent at the time the execution was placed with the bailiff for levy. *Citizens Banking Company* v. *Ravenna National Bank*, 234 U. S. 360, 364; *Stitzer Hotel Company* v. *Beyer*, 55 F. (2d) 620, 621; *In Re Ross and O'Brien Iron Works, Inc.*, 58 F. (2d) 961, 962; *In Re Fisher*, 219 F. 638, 639; *In Re McGraw*, 254 F. 442, 446.

Neither the petitioner's foreclosure suit brought on June 29, 1942 (R. 1-9), nor the intervening petition of the United States, filed subsequent to October 28, 1942 (R. 18-19, 43), contain any showing or allegation that the debtor was insolvent when the execution was placed in the hands of the bailiff for levy. The record is devoid of any such evidence. The United States makes no such contention. Plainly, no act of bankruptcy was committed as defined by clause (3).

Clause (5) remains to be considered. Petitioner's foreclosure suit was brought to enforce his statutory lien on the personal property of the debtor, used by it in connection with its business (R. 6). The receivership was incidental to the enforcement of the lien. A receivership in foreclosure does not constitute an act of bankruptcy. The type of receivership contemplated in clause (5) is one that involves a liquidation of all of the property of the bankrupt within the jurisdiction, and in substance amounts to

a general assignment of the bankrupt's assets. *Conrad* v. *Atlantic Insurance Company, supra,* p. 439; *Elfast* v. *Lamb,* 111 F. (2d) 434, 436. It does not contemplate a receivership to aid a lienholder in realizing on his lien. *Duparquet Company* v. *Evans,* 297 U. S. 216, 224; *Standard Accident Insurance Company* v. *Sheftall & Company,* 53 F. (2d) 40, 41. No act of bankruptcy was, therefore, committed, as defined in clause (5).

It should also be noted that under clause (5) no act of bankruptcy is committed unless the debtor is insolvent at the time of the appointment of the receiver. The United States has not shown or alleged that the debtor was insolvent when the receiver was appointed. Its intervening petition, filed approximately four months after the appointment of the receiver, states that "the defendant herein *is* insolvent and is unable to pay and discharge in full all of its indebtedness." (R. 18.) Petitioner's answer to the said intervening petition merely admitted that the debtor was insolvent as of the date of the said answer (R. 20).

Although petitioner, in his foreclosure suit, alleged that he believed the debtor to be insolvent (R. 7) such an allegation is totally insufficient to constitute insolvency under clause (5).[15] See also *United States* v. *Oklahoma, supra,* 259-263. Moreover, the allegation was clearly inadequate to sustain the burden which the United States had of establishing not the belief but the fact of insolvency at the time of the appointment of the receiver.

It is respectfully submitted that Section 3466 is inapplicable, since no act of bankruptcy was shown to have been committed.

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[15] "A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." (11 U. S. C. A. 1.)

III.

THE STATE'S LIEN WAS SO FAR SPECIFIC AND PERFECTED AS EFFECTIVELY TO EXCLUDE THE FUNDS IN QUESTION FROM THE ESTATE OF THE DEBTOR, THEREBY DEFEATING THE FEDERAL GOVERNMENT'S RIGHT OF ACCESS TO SUCH FUNDS.

Even if it is assumed that Section 3466 is applicable to a claim for unemployment compensation contributions and that the debtor was insolvent within the intendment of the statute, nevertheless the United States is not entitled to priority as the lien of the petitioner was specific and perfected when the receiver was appointed.

Although not expressly deciding the question, this Court has repeatedly implied that pre-existing liens which are specific and perfected will defeat the priority of the United States under Section 3466. *Thelusson* v. *Smith*, 2 Wheat. 396, 425-426; *Conrad* v. *Atlantic Insurance Company*, 1 Pet. 386, 441, 444; *Spokane County* v. *United States*, 279 U. S. 80, 95; *New York* v. *Maclay*, 288 U. S. 290, 293, 294; *United States* v. *Knott*, 298 U. S. 544, 549-551; *United States* v. *Texas*, 314 U. S. 480, 485, 486; *United States* v. *Waddill*, 323 U. S. 353, 360.

In *United States* v. *Knott*, *supra*, 551, this Court in effect declared that a specific and perfected lien would bar the priority of the United States.

In its final opinion of September 17, 1945, the court below held that petitioner's lien was not specific and perfected. The Court's conclusion was predicated entirely on dissimilar facts in the case of *The People, For the Use of Francis B. Murphy, Director of Labor, Appellee*, v. *Adver-*

tising Review Publishing Company, et al.,—(United States of America, Appellant), No. 28490, which was consolidated for opinion with the case at bar. A plain reading of the opinion discloses that the Court completely overlooked the facts in the case at bar.

1. Petitioner's lien was specific at the time of the appointment of the receiver.

The debtor filed contribution reports showing the precise amount of contributions due and owing and admitted its indebtedness (R. 3-4). Notice of the lien, disclosing the amount of contributions due from the debtor, was recorded (R. 5, 9-12). All this was done prior to the appointment of the receiver. The amount of contributions secured by the lien, therefore, was certain and liquidated at the time the receiver was appointed. The property, subject to the lien, was also ascertainable at that time. It was already in the custody of the bailiff and became fixed and constant when the injunction against the bailiff was granted (R. 7, 13). This Court has applied various tests in determining the specificity of liens. It has held that the liability should be known and determined and that the property subject to the lien should be ascertainable. *New York* v. *Maclay, supra,* 293; *United States* v. *Texas, supra,* 487, 488; *United States* v. *Waddill, supra,* 357, 358. Judged by these tests, the petitioner's lien was unquestionably specific.

2. Petitioner's lien was perfected at the time of the appointment of the receiver.

All substantial aids to the enforcement of the lien had been utilized. Foreclosure proceedings had been instituted to enforce the lien in accordance with the provisions of the Illinois Unemployment Compensation Act (Appendix, *infra,* p. 47). The debtor was divested of possession of

its personal property by the bailiff (R. 7). The petitioner obtained a writ enjoining the bailiff from selling such property (R. 13). By actually asserting his lien and enjoining the bailiff, the petitioner was enabled to satisfy his claim out of the seized goods. Petitioner's lien at the time of the appointment of the receiver was not "a caveat of a more perfect lien to come" but it was a perfected lien as measured by the standards prescribed by this Court. *Thelusson* v. *Smith, supra,* 425, 426; *Spokane County* v. *U. S., supra,* 94; *United States* v. *Texas, supra,* 487, 488; *United States* v. *Waddill, supra,* 358, 359.

It is respectfully submitted that the petitioner's lien possesses all the characteristics which this Court deems essential to a specific and perfected lien.

IV.

THE CLAIM OF THE STATE OF ILLINOIS FOR UNEMPLOYMENT COMPENSATION CONTRIBUTIONS WAS A SECURED CLAIM AND CONSEQUENTLY WAS ENTITLED TO PRIORITY OVER THE UNSECURED CLAIM OF THE UNITED STATES FOR SOCIAL SECURITY EXCISE TAXES.

The claim of the United States to priority is based solely on Section 3466. The foregoing arguments under Point I conclusively demonstrate that no such priority exists, and that Section 3466 may not be invoked to defeat a claim for unemployment compensation contributions. In *Rivard* v. *Bijou Furniture Company, supra,* the Supreme Court of Rhode Island held that, since Section 3466 was inapplicable, the claim of the State for unemployment compensation contributions and the claims of the United States for capital

stock tax and Federal insurance contributions were entitled to parity. However, the Supreme Court of Rhode Island specifically noted in its opinion that no liens were involved. (67 R. I. 253, 21 Atl. (2d) 565).

In that respect the case at bar is distinguishable from the *Rivard case, supra.* In the case at bar the United States did not contend, nor is there any evidence in the record to indicate, that its claim was secured by a lien. On the other hand, the record shows that the claim of the petitioner was secured by a lien which had attached to the personal property or rights used by the debtor in connection with its business (R. 4-5). The debtor was a corporation and could only own such personal property as was appropriate for the transaction of its business. Ch. 32, Sec. 157.5(d), Ill. Rev. Stat., 1943; *Bixler* v. *Summerfield,* 195 Ill. 147, 153; *People* v. *Chicago Gas Trust Company,* 130 Ill. 268, 287. In the absence of any evidence to the contrary, it is, of course, to be presumed that the personal property of the debtor, upon which the petitioner sought to foreclose his lien, was used by such debtor in connection with its business.

It is, therefore, respectfully submitted that the petitioner's secured claim is entitled to preference over the unsecured claim of the United States.

Even if it is assumed that Section 3466 may be invoked against a claim for unemployment compensation contributions, nevertheless the United States is not entitled to priority. The foregoing arguments under Point II and III decisively show that the debtor was not insolvent within the meaning of Section 3466 or that if it was so insolvent the lien of the petitioner was specific and perfected so as to bar the priority of the United States. In either event the

secured claim of the petitioner is entitled to preference over the unsecured claim of the United States.

Conclusion.

For the reasons stated, petitioner prays that the petition for a writ of *certiorari* be granted.

GEORGE F. BARRETT,
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Attorney for Petitioner.

ALBERT E. HALLETT,
WILLIAM C. WINES,
Assistants Attorney General,
Of Counsel.

APPENDIX.

Section 3466 of the Revised Statutes of the United States.
(31 U. S. C. A. 191).

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

THE SOCIAL SECURITY ACT.
Ch. 531, 49 Stat. 620.

* * * * * * *

Title III—Grants to States for Unemployment Compensation Administration.

Appropriation.

Section 301. For the purpose of assisting the States in the administration of their unemployment compensation laws, there is hereby authorized to be appropriated, for the fiscal year ending June 30, 1936, the sum of $4,000,000, and for each fiscal year thereafter the sum of $49,000,000, to be used as hereinafter provided.

Payments to States.

Sec. 302(a). The Board shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Board under Title IX, such amounts as the Board determines to be necessary for the proper administration of such law during the fiscal year in which such payment is to be made. The Board's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and of the cost of proper administration of such law; and (3) such other factors as the Board finds relevant. The Board shall not certify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year.

(b) Out of the sums appropriated therefor, the Secretary of the Treasury shall, upon receiving a certification under subsection (a), pay through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, to the State agency charged with the administration of such law the amount so certified.

Provisions of State Laws.

Sec. 303 (a). The Board shall make no certification for payment to any State unless it finds that the law of such State, approved by the Board under Title IX, includes provisions for—

(1) Such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices in the State or such other agencies as the Board may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State, immediately upon such receipt, to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904; and

(5) Expenditure of all money requisitioned by the State agency from the Unemployment Trust fund, in the payment of unemployment compensation, exclusive of expenses of administration; and

(6) The making of such reports, in such form and containing such information, as the Board may from time to time require, and compliance with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law.

(b) Whenever the Board, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a);

the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that there is no longer any such denial or failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State.

* * * * * *

TITLE VII—SOCIAL SECURITY BOARD.

Establishment.

SECTION 701. There is hereby established a Social Security Board (in this Act referred to as the "Board") to be composed of three members to be appointed by the President, by and with the advice and consent of the Senate. During his term of membership on the Board, no member shall engage in any other business, vocation, or employment. Not more than two of the members of the Board shall be members of the same political party. Each member shall receive a salary at the rate of $10,000 a year and shall hold office for a term of six years, except that (1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term; and (2) the terms of office of the members first taking office after the date of the enactment of this Act shall expire, as designated by the President at the time of appointment, one at the end of two years, one at the end of four years, and one at the end of six years, after the date of the enactment of this Act. The President shall designate one of the members as the chairman of the Board.

Duties Of Social Security Board.

Sec. 702. The Board shall perform the duties imposed upon it by this Act and shall also have the duty of studying and making recommendations as to the most effective methods of providing economic security through social insurance and as to legislation and matters of administrative policy concerning old-age pensions, unemployment compensation, accident compensation, and related subjects.

Expenses Of The Board.

Section 703. The Board is authorized to appoint and fix the compensation of such officers and employees, and to make such expenditures, as may be necessary for carrying out its functions under this Act. Appointments of attorneys and experts may be made without regard to the civil-service laws.

Reports.

Sec. 704. The Board shall make a full report to Congress, at the beginning of each regular session, of the administration of the functions with which it is charged.

* * * * * * *

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

Imposition Of Tax.

Section 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

Credit Against Tax

Sec. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903.

Certification Of State Laws.

Sec. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that—

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organizations;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time. The Board shall, upon approving such law, notify the Governor of the State of its approval.

(b) On December 31 in each taxable year the Board shall certify to the Secretary of the Treasury each State whose law it has previously approved, except that it shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Board finds has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provisions.

(c) If, at any time during the taxable year, the Board has reason to believe that a State whose law it has previously approved, may not be certified under subsection (b), it shall promptly so notify the Governor of such State.

Unemployment Trust Fund.

Sec. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund," hereinafter in this title called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public

debt; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 per centum next lower than such average rate. Obligations other than such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition.

(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment.

* * * * * *

Interstate Commerce.

Sec. 906. No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in

interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.

Definitions.

Sec. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(d) The term "State agency" means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(e) The term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation.

(f) The term "contributions" means payments required by a State law to be made by an employer into an unemployment fund, to the extent that such payments are made by him without any part thereof being deducted or deductible from the wages of individuals in his employ.

(g) The term "compensation" means cash benefits payable to individuals with respect to their unemployment.

ILLINOIS UNEMPLOYMENT COMPENSATION ACT.
Ch. 48, Sec. 243, Ill. Rev. Stat., 1943

§26. LIEN CREATED UPON ASSETS OF EMPLOYER—COMMENCEMENT—LIMITATION.) (a) A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions,

interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. In all cases where a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that the determination and assessmenf of the Director made pursuant to the provisions of this Act became final.

INNOCENT PURCHASER — RECORDATION — WITHDRAWAL OF NOTICE.

(b) (1) Such lien shall be invalid only as to any innocent purchaser for value of stock in trade of any employer in the usual course of such employer's business, and shall be invalid as to any innocent purchaser for value of any of the other assets to which such lien has attached, unless notice thereof has been filed by the Director in the office of the Recorder of Deeds of the county within which the property subject to the lien is situated. The Director may, in his discretion, for good cause shown, issue a certificate of withdrawal of notice of lien filed against any employer, which certificate shall be recorded in the same manner as herein provided for the recording of notice of liens. Such withdrawal of notice of lien shall invalidate such lien as against any person acquiring any of such employers' property or any interest therein, subsequent to the recordation of the withdrawal of notice of lien, but shall not otherwise affect the validity of such lien, nor shall it prevent the

Director from re-recording notice of such lien. In the event notice of such lien is re-recorded, such notice shall be effective as against third persons only as of the date of such re-recordation.

FILING OF NOTICE—LIEN INDEX.

(2) The Recorder of Deeds of each county shall procure at the expense of the county a file labeled "Unemployment Compensation Contribution Lien Notices" and an index book labeled "Unemployment Compensation Contribution Lien Index." When a notice of any such lien is presented to him for filing, he shall file it in numerical order in the file and shall enter it alphabetically in the index. The entry shall show the name, and last known business address of the employer named in the notice, the serial number of the notice, the date and hour of filing, and the amount of contribution, interest and penalty thereon due and unpaid. When a certificate of complete or partial release of such lien issued by the Director is presented for filing in the office of the Recorder of Deeds where a notice of lien was filed, the Recorder shall permanently attach the certificate of release to the notice of lien and shall enter the certificate of release and the date in the Unemployment Compensation Contribution Lien Index on the line where the notice of lien is entered.

* * * * * * *

PRIORITY OF LIEN.

(d) The lien herein created in favor of the Director shall be prior to all other liens whether general or specific, and shall be inferior only to any claim for wages filed pursuant to "An Act to protect employees and laborers in their claims for wages" approved June 15, 1887, as

amended, in an amount not exceeding $250.00 for work performed within six months from the date of filing such claim, and to such liens as shall attach prior to the filing of Notice of Lien by the Director with the Recorder of Deeds as provided in this Act; provided, however, that in all cases where statutory provision is made for the recordation or other public notice of a lien, the lien of the Director shall be inferior only to such liens as shall have been duly recorded, or of which public notice shall have been duly given, in the manner provided by such statute, prior to the filing of notice of lien by the Director with the Recorder of Deeds as in this Act provided.

FORECLOSURE OF LIEN.

(e) In addition and as an alternative to any other remedy provided by this Act, or by the laws of the State of Illinois, the Director may enforce the lien herein created by petition in the name of the People of the State of Illinois to the Circuit Court of the county wherein the property subject to the lien is situated, praying that the lien which has attached to said property, be foreclosed and the aforesaid property be sold in the same manner as in cases of foreclosure of mortgages upon personal property in courts of record. In all such cases, it shall not be necessary that said petition describe the property to which said lien has attached and it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, of all personal property and rights thereto which he owned at the time the contributions, upon which the lien sought to be foreclosed is based, became due, or which he subsequently acquired, indicating upon such schedule the property so owned by such employer which was, or is used by such em-

ployer in connection with his trade, occupation, profession or business, and if such employer shall so fail to do after having been so ordered by the court, he may be punished as in other cases of contempt of court.

The court in which such proceedings shall be pending may issue such process, make such orders requiring the parties to appear and require such notice to be given as is, or may be made, in other civil actions and shall have the same power and jurisdiction of the parties in such matter, and the rules of practice shall be the same as in other civil cases except as is otherwise provided by this Act.

Upon sale of the aforesaid personal property, the proceeds shall be applied to the payment of the costs incurred in the proceeding; the satisfaction of such liens as have attached to said property in the order of their priority and the balance, if any, to such parties as the court shall find to be entitled thereto. The Director is hereby empowered to bid at any sale conducted pursuant to the provisions of this Act.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION.

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CHAMPLIN-SNEALY COMPANY, CHICAGO 388

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, ex rel. ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION.

Respondent, in opposing the petition of the State of Illinois for a writ of *certiorari*, in effect concedes that there is a conflict between the decision of the Supreme Court of Illinois in the instant case and the decision of the Supreme Court of Rhode Island in *Rivard* v. *Bijou Furniture Company*, 67 R. I. 251, modified 68 R. I. 358, with respect to the following substantial question:

In view of the intent of Congress, as manifested in the Social Security Act and related legislation, does Section 3466 of the Revised Statutes of the United States apply to give a claim of the United States for social security excise

taxes priority over the claim of a State for unemployment compensation contributions when such contributions are exacted under a State statute adopted in accordance with the Congressional policy evinced by the Federal Act?

Respondent, however, contends that review of this question is unnecessary in view of this Court's decision in *United States* v. *New York*, 315 U. S. 510. A plain reading of the *New York* case reveals its inapplicability to the question under consideration. The *New York* case did not involve Section 3466 of the United States Revised Statutes. It involved Section 64(a)(4) of the Bankruptcy Act[1] which places State and Federal claims on a parity. The following three issues were considered in the *New York* case: (1) Whether the claim of the United States based on Sections 801 and 802 of Title VIII of the Social Security Act was a claim for a debt rather than for taxes and thus not entitled to priority under Section 64(a)(4) of the Bankruptcy Act; (2) Whether a portion of the claim of the United States, based on Title IX of the Social Security Act, constituted a penalty rather than a tax; (3) The formula to be used in prorating the funds.

Obviously the decision in the *New York* case had no bearing on the question under consideration in the case at bar. As respondent concedes (Respondent's Brief 12), the *New York* case was expressly called to the attention of the Supreme Court of Rhode Island in the *Rivard* case (68 R. I. 362, 27 Atl. (2d) 855), and that Court held it inapplicable to the question of priority under Section 3466 of the United States Revised Statutes.

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[1] "Section 64. Debts which have priority.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . . " U. S. C., Title 11, § 104.

It is respectfully submitted that the conflict between the decisions of the Supreme Courts of Illinois and Rhode Island remains to be resolved by this Court.

Respondent implies (Respondent's Brief 8) that the only manner in which Section 3466 may be "waived" is by express declaration of Congress. The contention is untenable in view of the decisions of this Court that it will not apply Section 3466 where the concept of Federal priority is inconsistent with the intention of Congress, as manifested in other statutes. *United States* v. *Marxen*, 307 U. S. 200; *United States* v. *Guaranty Trust Company of New York*, 280 U. S. 478; *Mellon* v. *Michigan Trust Company*, 271 U. S. 236; *Cook County National Bank* v. *United States*, 107 U. S. 445. (Petitioner's Brief 12.) That Congress intended in the case of competing State and Federal Social Security claims, to waive the priority of Section 3466 is unmistakably demonstrated by the provisions of Titles III, VII and IX of the Social Security Act, the amendments to Title IX and related legislation of Congress (Petitioner's Brief 12-23).

Respondent contends that the finding of the court below that petitioner did not have a specific and perfected lien is in accord with the principle laid down in *United States* v. *Waddill*, 323 U. S. 353. (Respondent's Brief 8.) Petitioner concedes that as to the companion case—*People of the State of Illinois ex rel. Robert L. Gordon, Director of Labor, Petitioner*, v. *United States of America, Respondent*, No. 749,—such holding is correct and no such issue is therefore being raised before this Court in said companion case. However, in arriving at its finding, the court below merely considered the facts in the companion case and nowhere in its decision did it refer to the entirely dissimilar facts of the case at bar. (Petitioner's Brief 29-31.)

Significantly, respondent makes no attempt to show how the principle of *United States* v. *Waddill, supra,* squares with the facts in the instant case. Under the principle of the *Waddill* case, *supra,* petitioner's lien clearly possesses the characteristics of a specific and perfected lien.

Conclusion.

It is therefore respectfully submitted that the questions herein presented are Federal questions of substance not heretofore precisely determined by this Court; that such questions are of great importance at this particular time not only to the State of Illinois and all employers and employees therein but to all states and all employers and employees; that the conceded conflict of the Supreme Courts of Illinois and Rhode Island on the first of these issues should be passed upon and resolved by this Court; and that the decision of this Court in *United States* v. *New York, supra,* cited and relied upon by respondent, does not determine or control the decision of the issues herein presented.

The petition should therefore be allowed.

Respectfully submitted,

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Attorney for Petitioner.

ALBERT E. HALLETT,
WILLIAM C. WINES,
Assistants Attorney General,
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IN THE

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OCTOBER TERM, A. D. 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER.

The Opinion of the Court Below.

The order of the Circuit Court of Cook County, Illinois, was entered without an opinion (R. 22). The final opinion of the Supreme Court of Illinois (R. 42-55) in this case is reported in 391 Ill. 29, 62 N. E. (2d) 537, under the name *"The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *Chicago Waste & Textile Company, et al, Carter H. Harrison, Collector of Internal Revenue, Appellant"*, as No. 28474.

Jurisdiction of This Court.

The jurisdiction of this Court is based upon the provisions of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 937, U. S. Code, Title 28, Section 344, paragraph (b), authorizing writs of *certiorari* to be issued to the highest courts of the various states where any title, right, privilege or immunity is specially set up or claimed by either party under any statute of, or authority exercised under, the United States.

In his original claim (R. 14), amended claim (R. 16) and intervening petition (R. 18), the Collector of Internal Revenue, acting under the authority of the United States, specially based his claim for a priority in the distribution of the assets of the debtor upon the provisions of Section 3466 of the Revised Statutes of the United States. The applicability of this Federal statute was raised and contested throughout every state of these proceedings (R. 20, 23, 30, 31, 44, 48). The Circuit Court of Cook County, Illinois, in effect decided against the contentions of the Collector (R. 22). The Supreme Court of Illinois, which is the highest court in Illinois, passed upon the applicability of said Section 3466 and specifically granted priority to the Collector thereunder (R. 42, 53).

In seeking a review by this Court two reasons for granting the writ were urged; **First**—That the Court below decided a Federal question of substance not heretofore precisely determined by this Court and in so doing expressly recognized (R. 51) that its decision was in direct conflict with the decision of the highest court of a sister state (*Rivard* v. *Bijou Furniture Co.*, 68 R. I. 358); and **Second**—That the court below decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court. These reasons are fully set

forth in the Petition for *Certiorari* (pp. 8-11), are discussed fully in the body of the brief and argument herein and will therefore not be discussed further at this point.

The final judgment of the Supreme Court of Illinois was rendered on September 17, 1945, (R. 42). The petition for *certiorari* was filed on January 15, 1946, time for such filing having been extended by order of this Court to and including January 16, 1946 (R. 57). On February 25, 1946, *certiorari* was granted by this Court (R. 58).

A companion case, *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner,* v. *The United States of America, Respondent,* No. 749 of the current term, involving similar but not identical issues, is also before this Court, *certiorari* having been granted concurrently with the award in the instant case.

Concise Statement of The Case.

This case and the above entitled companion case present two important questions, decided in favor of the United States Government by the Supreme Court of Illinois. The first of these issues was decided adversely to the United States Government by the Supreme Court of Rhode Island in the case of *Rivard* v. *Bijou Furniture Company,* 67 R. I. 251, 21 Atl. (2d) 563; 68 R. I. 358, 27 Atl. (2d) 853, in an opinion which the Supreme Court of Illinois expressly recognized as in point but declined to follow. These questions may be stated as follows:

> In view of the intent of Congress as manifested in the Social Security Act and related legislation, does section 3466 of the Revised Statutes of the United States (Appendix, *infra,*) apply to give a claim of the United States for Social Security excise taxes a priority over the claim of a state for Unemployment Compensation contributions when such employment com-

pensation contributions are exacted under a state statute adopted in accordance with the Congressional policy evinced by the Federal Act?

Was the claim of the State of Illinois for Unemployment Compensation contributions a secured claim and consequently entitled to priority over the unsecured claim of the United States for Social Security Excise taxes?

The instant case also presents two additional questions, not involved in the companion case, which are as follows:

Was the debtor insolvent within the meaning of section 3466 of the Revised Statutes of the United States?

Was the state's lien for unemployment compensation contributions so far specific and perfected as effectively to exclude the funds in question from the estate of the debtor and thereby to defeat the Federal Government's right of access to such funds?

These questions emerge from facts which are not in dispute and are briefly stated as follows:

On June 29, 1942, the Director of Labor of the State of Illinois filed a complaint in the Circuit Court of Cook County, Illinois, to foreclose his statutory lien for unemployment compensation contributions (R. 1). The allegations of the complaint, which are undisputed, may be summarized as follows:

Chicago Waste and Textile Company, a corporation, hereinafter called the debtor, was an employer, subject to the Illinois Unemployment Compensation Act (R. 2). It became indebted to the Director of Labor in the sum of $734.89, plus interest and penalties, for contributions due under the Act (R. 2-3). It admitted its indebtedness to the Director, and its liability for the said contributions

and the amount thereof were based upon reports it had filed with the Director of Labor (R. 3-4).

Section 26 (a) of the Illinois Unemployment Compensation Act created a lien in favor of the Director for a sum equal to the amount of contributions, interest and penalties due from the said debtor. Such lien attached to the personal property or rights used by the debtor in connection with its business (R. 4-5). Notice of the said lien was filed by the Director prior to May 21, 1942, in the office of the Recorder of Deeds of Cook County, Illinois (R. 5, 9-12).*

Associated Agencies, Inc. obtained a judgment against the debtor in the Municipal Court of Chicago, and execution upon such judgment was issued on June 3, 1942 (R. 6-7). Said Associated Agencies, Inc. requested the bailiff of the Municipal Court to levy upon and sell at public auction the personal property of the debtor which was subject to the Director's lien (R. 7). The bailiff served notice that he would hold such sale on June 29, 1942 (R. 7). The complaint of the Director of Labor also stated "That plaintiff is informed and believes and therefore states upon information and belief" that said debtor "is insolvent and that the personal property subject to the lien herein being foreclosed is scant security for the debt due the Director" and prayed for an injunction to restrain the bailiff from selling the personal property of the debtor and for the appointment of a receiver (R. 7-9). The writ of injunction was granted and a receiver was appointed (R. 13).

On October 9, 1942 and October 28, 1942, Carter H. Harrison, Collector of Internal Revenue for the First District of Illinois, on behalf of the United States, filed claims for Federal unemployment taxes (more commonly known as taxes under Title IX of the Social Security Act) in the

* The provisions of the Illinois Unemployment Compensation Act relating to the lien of the Director are set forth in the Appendix, *infra*, pp. 58-62.

sum of $1,431.16, plus interest, and Federal insurance contributions (more commonly known as taxes under Title VIII of the Social Security Act) in the sum of $522.91, plus interest (R. 14-18). Subsequently, on November 16, 1942 (R. 43), the United States filed an intervening petition in which it alleged "That the defendant herein is insolvent and unable to pay and discharge in full all of its indebtedness," and that the United States is entitled to priority of payment under the provisions of Section 3466 of the United States Revised Statutes (R. 18-19). In his answer to the intervening petition, the Director admitted that the debtor "is insolvent and unable to pay and discharge in full all of its indebtedness", denied that the United States was entitled to priority under Section 3466 and claimed priority under his lien (R. 19-21). The Circuit Court of Cook County subsequently approved the final report of the receiver and ordered him to deposit the balance of $677.81, remaining in his hands, with the Clerk of the Circuit Court, subject to the further order of the Court (R. 21-22). The Circuit Court later ordered that the lien of the Director be given prior to the extent of 90 per cent of the funds on deposit with the Clerk of the Circuit Court, and that the United States have priority as to the 10 per cent remaining (R. 22).

In the Supreme Court of Illinois, because of the similarity of certain issues, the case at bar was consolidated for opinion with the companion case of *The People, For the Use of Francis B. Murphy, Director of Labor, Appellee,* v. *Advertising Review Publishing Company, et al.,— (United States of America, Appellant)*—No. 28490 (R. 25, 42) now before this Court under the style *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner,* v. *The United States of America, Respondent,* No. 749 of the current term. Since the facts in the two cases are dissimilar and the case at bar has additional

issues, separate petitions were submitted to this Court and separate briefs are being filed.

In its original opinion filed May 23, 1945, the Supreme Court of Illinois held that it was unnecessary in the case at bar to decide the various questions raised by the United States and the Director of Labor with respect to Section 3466 of the United States Revised Statutes; that on the basis of the credit provisions of Section 602 (b) of the Revenue Act of 1943 (26 U. S. C. 602 (b)), the Director was entitled to the entire funds on deposit with the Clerk of the Circuit Court of Cook County, Illinois (R. 26-28), and that the amount so paid the Director should be credited on the claim of the Collector against the debtor. The United States filed a petition for rehearing (R. 39-41). On September 17, 1945, the Supreme Court of Illinois denied the petition for rehearing (R. 41) but modified its previous opinion and held that under Section 3466 the United States was entitled to priority on that portion of its claim which was for Federal insurance contributions, plus interest, and any balance remaining was to be paid to the Director and credited against the claim of the United States for Federal unemployment taxes (R. 42-55).

In reaching this result, the Supreme Court of Illinois held that the Collector's claim for Federal insurance contribution taxes was, under Section 3466 of the Revised Statutes, entitled to priority over the claim of the State of Illinois for unemployment contributions, but expressly conceded that its holding on that issue was in direct conflict with the holding of the Supreme Court of Rhode Island in *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, 21 Atl. (2d) 563 (R. 51). The Supreme Court of Illinois also held that the petitioner's lien was not so specific and perfected as to bar the priority of the United States under Section 3466. In so doing, however, its conclusion was predicated en-

tirely upon the very dissimilar facts in the companion case of *The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *Advertising Review Publishing Company, et al.,* case No. 28490, which had been consolidated for opinion with the instant case (second paragraph, R. 52), and not upon the facts in the case at bar. It also based its said holding upon this Court's pronouncements in *United States* v. *Waddill, Holland and Flinn,* 323 U. S. 353, which, as we shall demonstrate under Point III, does not apply to such a situation but only relates to the facts similar to those presented in the said companion case. The Supreme Court of Illinois also impliedly denied petitioner's contention that the debtor was not insolvent within the meaning of Section 3466 of the Revised Statutes.

Specification of Assigned Errors Intended to Be Urged.

The Supreme Court of Illinois erred:

1. In holding that the claim of the United States for Federal insurance contributions was entitled to priority under Section 3466 of the United States Revised Statutes over the claim of the petitioner for unemployment compensation contributions.

2. In holding that Section 3466 was applicable to defeat petitioner's claim for unemployment compensation contributions.

3. In holding that the debtor was insolvent within the meaning of Section 3466.

4. In holding that petitioner's lien was not specific and perfected so as to bar the priority of the United States under Section 3466.

5. In failing to hold that petitioner's secured claim was entitled to priority over the unsecured claim of the United States.

SUMMARY OF ARGUMENT.

I.

In View of the Intent of Congress as Manifested in the Social Security Act and Related Legislation, Section 3466 of the Revised Statutes Is Not Applicable to Give a Claim of the United States for Social Security Excise Taxes a Priority Over the Claim of a State for Unemployment Compensation Contributions When Such Contributions Are Exacted Under a State Statute Adopted in Accordance with the Congressional Policy Evinced by the Federal Act.

United States v. *Marxen*, 307 U. S. 200, 206.
United States v. *Guaranty Trust Company of New York*, 280 U. S. 478, 485.
Mellon v. *Michigan Trust Company*, 271 U. S. 236, 240.
Cook County National Bank v. *United States*, 107 U. S. 445.
United States v. *Texas*, 314 U. S. 480.
Price v. *United States*, 269 U. S. 492.
Stripe v. *United States*, 269 U. S. 503.
Spokane County v. *United States*, 279 U. S. 80.
New York v. *Maclay*, 288 U. S. 290.
United States v. *Waddill Co.*, 323 U. S. 353.
Matter of White Plains Oil Corp., 287 N. Y. 141.
United States v. *New York*, 315 U. S. 510.
Steward Machine Company v. *Davis*, 301 U. S. 548, 586-589, 591.
Helvering v. *Davis*, 301 U. S. 619, 641.
Rivard v. *Bijou Furniture Company*, 67 R. I. 251, 21 Atl. (2d) 563, 68 R. I. 385, 27 Atl. (2d) 853.

II.

The Debtor Was Not Insolvent Within the Meaning of Section 3466 of the Revised Statutes.

United States v. *Oklahoma*, 261 U. S. 253, 260-263.

Conard v. *Atlantic Insurance Company*, 26 U. S. (1 Peters) 389, 439.

United States v. *Fisher*, 2 Cranch 358, 390.

Beaston v. *Farmers Bank*, 12 Peters 102, 133-134, 138.

Kennebec Box Company, Inc. v. *O. S. Richards Corp.*, 299 F. 871, 873.

Nolte v. *Hudson Navigation Company*, 8 F. (2d) 859, 865-866.

Citizens Banking Company v. *Ravenna National Bank*, 234 U. S. 360, 364.

Stitzer Hotel Company v. *Beyer*, 55 F. (2d) 620, 621.

In Re Ross and O'Brien Iron Works, Inc., 58 F. (2d) 961, 962.

In Re Fisher, 619 F. 638, 639.

In Re McGraw, 254 F. 442, 446.

Elfast v. *Lamb*, 111 F. (2d) 434, 436.

Duparquet Company v. *Evans*, 297 U. S. 216, 224.

Standard Accident Insurance Company v. *Sheftall & Company*, 53 F. (2d) 40, 41.

III.

The State's Lien Was So Specific and So Far Perfected as Effectively to Exclude the Funds in Question from the Estate of the Debtor, and Thereby to Defeat the Federal Government's Right of Access to Such Funds Under Section 3466.

Thelusson v. *Smith*, 15 U. S. (2 Wheat.) 396, 425.
Conard v. *Atlantic Insurance Co.*, 26 U. S. (1 Peters) 386, 441, 443.
Spokane County v. *United States*, 279 U. S. 80, 94, 95.
New York v. *Maclay*, 288 U. S. 290, 293, 294.
United States v. *Knott*, 298 U. S. 544, 549-551.
United States v. *Texas*, 314 U. S. 480, 484, 486-488.
United States v. *Waddill Co.*, 323 U. S. 353, 355, 356, 357-60.

IV.

The Claim of the State of Illinois for Unemployment Compensation Contributions Was a Secured Claim and Consequently Was Entitled to Priority Over the Unsecured Claim of the United States for Social Security Excise Taxes.

Price v. *United States*, 269 U. S. 492, 499.
Mellon v. *Michigan Trust Co.*, 271 U. S. 236, 239.
United States v. *Oklahoma*, 261 U. S. 253, 259.
Bixler v. *Summerfield*, 195 Ill. 147, 153.
People v. *Chicago Gas Trust Company*, 130 Ill. 268, 287.
Hooven v. *Burdette*, 153 Ill. 672, 679.
Rivard v. *Bijou Furniture Company*, 67 R. I. 251, 21 Atl. (2d) 563, 68 R. I. 385, 27 Atl. (2d) 853.
United States v. *Texas*, 261 U. S. 253, 259.

ARGUMENT.

I.

IN VIEW OF THE INTENT OF CONGRESS AS MANIFESTED IN THE SOCIAL SECURITY ACT AND RELATED LEGISLATION, SECTION 3466 OF THE REVISED STATUTES IS NOT APPLICABLE TO GIVE A CLAIM OF THE UNITED STATES FOR SOCIAL SECURITY EXCISE TAXES A PRIORITY OVER THE CLAIM OF A STATE FOR UNEMPLOYMENT COMPENSATION CONTRIBUTIONS WHEN SUCH CONTRIBUTIONS ARE EXACTED UNDER A STATE STATUTE ADOPTED IN ACCORDANCE WITH THE CONGRESSIONAL POLICY EVINCED BY THE FEDERAL ACT.

This Court has repeatedly held that it will not apply Section 3466 where the concept of Federal priority is inconsistent with the intention of Congress, as manifested in a later Federal statute, and that this is so even where such other Federal statute does not in express terms waive such priority but leaves such intention to be inferred from the general provisions and purposes of such statute.

In *United States* v. *Marxen*, 307 U. S. 200, this Court held that the United States was not entitled to priority under Section 3466 on a claim transferred to it after the filing of a petition in bankruptcy, because of the general purposes of the Bankruptcy Act. This Court, at page 206, said:

> "But this principle of construction (priority to the United States) is subject to the limitation that the generality of language of the section is restricted * * * by legislative intention as shown in other statutes." (Bracketed words added.)

In *United States* v. *Guaranty Trust Company of New York*, 280 U. S. 478, this Court denied the United States priority under Section 3466 for loans due it under the Transportation Act because the intention to build up the credit standing of the railroads was inconsistent with the claimed priority. In so holding, this Court, at page 485, said:

> "To have given priority to debts due the United States pursuant to Title II, would have defeated the purpose of Congress. * * * The entire spirit of the Act makes clear the purpose that the rule leading to such consequences should not be applied."

In *Mellon* v. *Michigan Trust Company*, 271 U. S. 236, priority under Section 3466 was denied because the Federal Control Act, affecting the railroads, manifested an intention that the carriers under Federal control should be treated as before their transfer to Federal operation. In so holding, this Court, at page 240, said:

> "To permit the claimed preference, we think, would conflict with the spirit and broad purpose of the statute."

See also: *Cook County National Bank* v. *United States*, 107 U. S. 445.

This general principle is not challenged or limited by the holdings in such cases as *United States* v. *Texas*, 314 U. S. 480; *Price* v. *United States*, 269 U. S. 492; *Stripe* v. *United States*, 269 U. S. 503; *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Waddill*, 323 U. S. 353; or *Matter of White Plains Oil Corp.*, 287 N. Y. 141, cited by respondent in its brief in opposition. In none of those cases was it contended that the congress, in and by a subsequent Federal statute, had manifested its intention that, as to claims

arising under such subsequent statute, the priority provisions of Section 3466 were not to be applied.

Nor does the holding of this Court in *United States* v. *New York*, 315 U. S. 510, cited by respondent in its brief in opposition, challenge or limit this general principle. A plain reading of the *New York* case reveals its inapplicability to the question under consideration. The *New York* case did not involve Section 3466 of the United States Revised Statutes. It involved Section 64 (a) (4) of the Bankruptcy Act[1] which places State and Federal claims on a parity. The following three issues were considered in the *New York* case: (1) Whether the claim of the United States based on Sections 801 and 802 of Title VIII of the Social Security Act was a claim for a debt rather than for taxes and thus not entitled to priority under Section 64 (a) (4) of the Bankruptcy Act; (2) Whether a portion of the claim of the United States, based on Title IX of the Social Security Act, constituted a penalty rather than a tax; (3) The formula to be used in prorating the funds. Obviously the decision in the New York Case had no bearing on the question under consideration in the case at bar.

The above general legal principles being established, let us now examine the provisions of the Social Security Act and related legislation to ascertain whether in and by such statutes the Congress has manifested an intention that the provisions of Section 3466 shall not apply as between a claim of the United States for Social Security excise taxes and a claim of a State for unemployment contributions exacted under a State statute adopted in accordance with the congressional policy evinced by such Federal Act.

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[1] "Section 64. Debts which have priority.—a. The debts to have priority in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and order of payment shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof . . ." U. S. C., Title 11, § 104.

The petitioner's claim for unemployment compensation contributions is predicated on a law which, like all other State unemployment compensation statutes, was enacted in furtherance of a paramount Federal policy. The character and origin of petitioner's claim stem from Title IX of the Social Security Act. The purpose of Title IX, as we shall show was to create a National program of unemployment insurance by inducing every State in the Union to establish a system of unemployment insurance which would meet the minimum standards imposed by Congress. Through the agency of each State, Congress sought the imposition and collection of contributions to be used in the payment of benefits to unemployed workers. Such action by the States was deemed essential in order to promote the general welfare of the Nation and to serve the fiscal needs of the Federal Treasury by relieving it of the terrific drains made upon it by unemployment relief. *Steward Machine Company* v. *Davis,* 301 U. S. 548, 586-589, 591.

Although petitioner's claim for unemployment compensation contributions has been referred to as a claim of the State, it is in reality a claim of the Nation. In its relation to the welfare of the Country and the needs of the Federal Treasury, it is, unquestionably, tantamount to a claim of the United States. That Congress deemed the raising of revenue through the States for the relief of the unemployed to be of such tremendous National importance as to bar the application of Section 3466 is incisively demonstrated by (1) the exigencies which gave rise to a National program of unemployment insurance; (2) the provisions of Titles III, VII and IX of the Social Security Act; (3) the amendments to Title IX; (4) related legislation of Congress.

1. The critical conditions which gave rise to a national program of unemployment insurance.

These exigencies have been pertinently and graphically described by this Court. In *Steward Machine Company* v. *Davis, supra,* pp. 586-588, which involved the constitutionality of Title IX, this Court declared:

> ". . . there is need to remind ourselves of facts as to the problem of unemployment . . . During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than ten million; at times a peak was attained of sixteen million or more. Disaster to the breadwinner meant disaster to dependants . . . The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66, *Helvering* v. *Davis*, decided herewith. The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936, the states . . . incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,920,307,125, or twice the obligations of states and local agencies combined.
>
> According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935 and 1936, the stupendous total of $8,681,000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these bur-

> dens in their train. . . . insofar as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation."

In *Helvering* v. *Davis,* 301 U. S. 619, 641, which involved an attack upon the constitutionality of Titles II and VII of the Social Security Act (Old Age Benefits), this Court stated:

> ". . . The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. . . . Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co. supra,* has set the doubt at rest. . . ."

The national scope of the problem of unemployment was stressed by the President of the United States in his message to Congress on June 8, 1934 [2] wherein he declared: "We are compelled to employ the active interests of the Nation as a whole through government in order to encourage a greater security for each individual who composes it. . . . If, as our Constitution tells us, the Federal government was established, among other things, to promote the general welfare it is our plain duty to provide for that security upon which welfare depends . . ."

Both branches of Congress emphasized that unemployment relief posed the most serious question for the Nation.[3]

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[2] Cong. Rec. Vol. 78, Pt. 10, p. 10770.

[3] Senate Report No. 628, 74th Congress, 1st Session, p. 10; House Report No. 615, 74th Congress, 1st Session, p. 7.

2. Title IX of the Social Security Act.

To cope with the problem, Congress enacted Titles III, VII and IX of the Social Security Act (*Infra* pp. 34-44) Briefly, Title IX provides that every employer (with stated exceptions) of eight or more workers is to pay an annual excise tax, measured by wages. The taxpayer, however, is allowed a credit against the Federal tax for the amount of contributions paid into an unemployment compensation fund established under a State law, said credit not to exceed 90 per cent of the Federal tax.[4] Such credit is allowable only if the State law is periodically certified by the Social Security Board to the Secretary of the Treasury as satisfying certain minimum criteria (*Infra* pp. 39-41). Among these criteria, which will shortly be considered, is the requirement that the State law provide that the contributions paid into the State fund be promptly paid over to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." The Secretary of the Treasury is directed to invest the funds (except such portion as is, in his opinion, required to meet current withdrawals) in government securities. He is directed to pay out of the fund, to any competent agency, such sums as it shall duly requisition from the amount standing to its credit. The money withdrawn from the Unemployment Trust Fund by the State agency must be used solely for the payment of unemployment compensation benefits.

The plain purpose of the credit is to build up an adequate fund through the payment of contributions into State unemployment compensation systems, thereby sustaining the National burden of unemployment and safeguarding the Federal Treasury. To the extent that taxpayers make con-

[4] The remaining 10 per cent is used in covering the costs of administering the State unemployment compensation systems. See *infra*, p. 20.

tributions to a State unemployment compensation fund, the drain upon the Federal Treasury is diminished. *Steward Machine Company* v. *Davis*, *supra*, pp. 589-591. The Federal tax and the credit are "approximate equivalents." *Steward Machine Company* v. *Davis*, *supra*, p. 591. The needs of the Federal Treasury can be cared for as well by payments of unemployment compensation contributions to the States as by payment of taxes to the United States. *Rivard, et al.* v. *Bijou Furniture Company*, 68 R. I. 358, 361, 27 Atl. (2d) 853, 855. That these principles were uppermost in the mind of Congress in extending the credit is apparent from an examination of the reports of both the Senate Finance Committee and the House Committee on Ways and Means.[5]

Moreover, Congress believed that the general welfare of the country would be better served by the payment of contributions into State unemployment compensation funds than by the payment of the tax to the Federal government. *Steward Machine Company* v. *Davis*, *supra*, p. 589.

As indicated, Title IX sets out certain criteria which the State law must satisfy before the taxpayer, who pays contributions under such a law, may avail himself of the credit. These criteria are manifestly designed to promote the fiscal policy of the Federal government by insuring that the State law under which the taxpayer makes his contributions is a genuine and workable unemployment insurance measure. If the State statute were merely masquerading as an unemployment compensation law and had been enacted to take advantage of the credit for some foreign purpose, the Federal fiscal policies which the credit is calculated to serve would be frustrated. *Steward Machine Company* v. *Davis*, *supra*, p. 593.

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[5] Senate Report No. 628, 74th Congress, 1st Session, p. 15; House Report No. 615, 74th Congress, 1st Session, p. 16.

3. Titles III and VII of the Social Security Act.

To further encourage the State to establish unemployment compensation systems, Congress, in Title III of the Social Security Act, provided for grants to cover the administrative costs of such systems (Appendix, *infra*, pp. 30-33). The funds for such grants are derived from the 10% of the Federal tax which the Government retains for the purpose of meeting the costs of administering the State unemployment compensation systems.[6] However, as in Title IX, the State unemployment compensation laws are required to meet certain minimum criteria, intended to advance the fiscal policy of the United States (Appendix, *infra*, pp. 35-37).

That Congress assumed responsibility for the successful operation of the State unemployment compensation systems is evidenced not only by the standards which it prescribed in Titles III and IX and by its supervision of the "Unemployment Trust Fund" but also by the control which it has exercised through the activities of the Social Security Board which it created under Title VII of the Social Security Act (Appendix, *infra*, pp. 37-38). Through the Social Security Board, Congress has continuously reviewed State unemployment compensation legislation

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[6] Message of the President to Congress, January 17, 1935, Cong. Rec., Vol. 79, Pt. 1, p. 546; Hearings before the Senate Committee on Finance on S. 1130, 74th Cong., 1st Session, p. 112; Report of the President's Committee on Economic Security, p. 19; House Report No. 1855, 78th Congress, 2nd Session, p. 27; P. Douglas, Social Security in the United States (1936), pp. 146-148. ". . . administrative costs, if we judge from German and English experience, are likely to equal one-ninth of the benefits or one-tenth of the total costs. See my Standards of Unemployment Insurance, pp. 122-123. It was not by accident, therefore, but rather from the very structure of unemployment insurance itself that the federal government was authorized in Title IX to retain one-tenth of the tax on payrolls instead of for example one-twentieth or, as in the federal inheritance tax two-tenths." Social Security in the United *States*, *supra*, footnote, p. 147.

and administration to assure conformity with Federal standards, has determined and grr ... the amount of funds necessary for proper administration of State unemployment compensation systems, has guided the States in improving their legislation and administration, and has engaged in research designed to analyze the character of the problem of unemployment and to serve as a basis for the revision of legislation and administrative techniques dealing with that problem.[7]

4. Amendments to Title IX of the Social Security Act.

It must be emphasized that Title IX of the Social Security Act does not establish a system of unemployment compensation. No provision is made therein for the payment of benefits to unemployed persons. By the credit provisions of Title IX and the grants for administrative purposes in Title III, the States were induced to set up unemployment of compensation systems to promote the general welfare of the Nation and to serve the fiscal needs of the Federal Treasury.

The heart of the unemployment compensation program is in the benefits which are paid by the States to unemployed workers and in the contributions which are collected by the States for the payment of such benefits. Time and time again, Congress has demonstrated that it is the payment of contributions to the States which advances the fiscal purposes of the Federal government. Although the credit against the Federal tax was originally allowed only if contributions to State funds were paid within a specified period of time, Congress has repeatedly amended Title IX so as to extend the credit to taxpayers who are delinquent

[7] The Social Security Board, Eighth American Scientific Congress May 10-18, 1940.

in the payment of contributions, in order to induce them to pay their contributions to the States.[8]

5. Related Legislation.

The Social Security Act became law on August 14, 1935. The payment of Federal taxes under Title IX commenced in 1936. A number of the States did not enact their unemployment compensation laws until some time later. In the meantime, the employers in such States, who were subject to the Federal tax, paid the full amount of the tax to the National government. The intention of Congress to achieve the purposes of Title IX through the payment of contributions into State unemployment compensation systems rather than through the payment of taxes to the Federal government is strikingly revealed in its action, in which it turned over 90 per cent of the taxes collected from the foregoing employers to the State unemployment compensation systems which had been established subsequent to the initial payment of Federal taxes under Title IX.[9]

There is still further proof, if need be, of the deep concern which Congress has manifested in the maintenance and growth of State unemployment compensation funds. Congress has fully recognized that such funds would play a major role during the period of post-war readjustment and would serve as the first line of defense for the millions of workers employed in war industries who would be laid off and unemployed during industry's reconversion and readjustment to peace-time production. The Senate and the House appointed Special Committees on Post-war

[8] Section 1601, Internal Revenue Act of 1939; Section 701, Second Revenue Act of 1940; Section 701 Revenue Act of 1941; Section 602 Revenue Act of 1943.

[9] Public Act 353, Ch. 755, 50 Stat. 754; Second Deficiency Appropriation Act 1938, Ch. 681, 52 Stat. 1148.

Economic Policy and Planning, which held extensive hearings on the problem of unemployment compensation in the post-war period.[10] Interviews with representatives of important government and private agencies on post-war problems and plans disclosed that "The fear of unemployment after the war colors the thinking of all the agencies interviewed. Those concerned with the labor problems give it first rank in their planning." [11] As a result of the recommendations of the said Special Committees on Post-war Economic Policy and Planning,[12] Congress enacted legislation guaranteeing the solvency of State unemployment compensation funds.[13]

In view of the tremendous importance which Congress attached to the accumulation of unemployment compensation contributions by the States, it is inconceivable that Congress expected or desired the collection of such contributions to be impaired or jeopardized by the invocation of Section 3466. On the contrary, the legislative purposes underlying Titles III, VII and IX of the Social Security Act reflect an intention on the part of Congress to subordinate the operation of Section 3466 to the paramount interest of insuring the success of the National program of unemployment relief.

In holding that the claim of the petitioner was subordinate to the claim of the United States for taxes under

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[10] Hearings before the Special Committee on Post-war Economic Policy and Planning, United States Senate, 78th Congress, Second Session, part 3, Unemployment Compensation; Hearings before the Special Committee on Post-war Economic Policy and Planning, House of Representatives, 78th Congress, Second Session, Parts 2 and 3, Economic Problems of the Transition Period.

[11] Senate Document No. 106, 78th Congress, 1st Session, p. 79.

[12] Senate Report No. 539, part 5, 78th Congress, 2nd Session, p. 6; House Report No. 1855, 78th Congress, 2nd Session, pp. 27-28.

[13] War Mobilization and Reconversion Act (50 U. S. C. A. App. 1667); Senate Report No. 565, 79th Congress, 1st Session, p. 2.

Title VIII, the Supreme Court of Illinois looked to form, not substance, and disregarded the character and significance of petitioner's claim. In the light of what has already been said, it is unnecessary to labor the point that petitioner's claim serves a Federal purpose, that it is tantamount to a claim of the United States, and that it stems from Title IX of the Social Security Act.

Both Titles VIII and IX are parts of the same Act and are designed to effectuate a common purpose—the general welfare of the United States. ". . . the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis, supra,* p. 641. Congress deemed unemployment "an even more prevalent cause of dependency than old age; in fact . . . the most serious of all hazards confronting industrial workers. . . ."[14] Obviously, Congress did not intend that a claim for unemployment compensation contributions should be subordinated to a claim for taxes for old-age security.

It is important to note that in its oral argument before this Court in *Steward Machine Company* v. *Davis, supra,* p. 559, the United States contended that in imposing and collecting contributions under their unemployment compensation laws, the States were raising revenue for the general welfare of the United States; that the framers of the Constitution contemplated three different methods of raising revenue for the general welfare of the Nation.

[14] House Report No. 615, 74th Congress, 1st Session, page 7; Senate Report No. 628, 74th Congress, 1st Session, page 10.

"The first was direct Federal taxation collected by Federal officers. The second was that the Federal government lay the tax but the collection be by the State officers. The third method is that the States raise the revenue for the general welfare of the United States."

To invoke Section 3466 on the grounds that the revenue for old-age security is raised by the Federal government, whereas the revenue for unemployment relief is raised by the States, is totally devoid of merit and utterly foreign to the spirit and purpose of the Social Security Act. The clear-cut purpose and intention of Congress to treat unemployment relief as a Federal obligation and to assume the responsibility for the success of the unemployment compensation systems initiated under Title IX of the Social Security Act is not to be defeated by the sophistry of treating a claim for unemployment compensation contributions as a State claim as distinguished from a Federal claim.

In view of the above, we submit that in and by the enactment of the Social Security Act and related legislation the Congress has clearly manifested an intention that the provisions of Section 3466 shall not apply as between a claim of the United States for Social Security excise taxes and a claim of a State for unemployment compensation contributions exacted under a State statute adopted in accordance with the congressional policy evinced in such Federal Act.

In the recent case of *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, 21 Atl. (2d) 563, the Supreme Court of Rhode Island passed upon substantially the same situation as is involved under this portion of the case at bar. In holding that the United States was not entitled to priority under Section 3466 because such a preference would be in con-

flict with the general policy, spirit and purposes of the Social Security Act, that court, in its original opinion, at page 259, said:

> "It is clear to us that the intention of Congress in the federal act was to have the federal government guide and assist the state in a comparatively new field of legislation. It is also clear that congress deemed cooperation between the two governments indispensable for success. To permit the claimed preference by the United States would conflict with the policy, spirit and broad purposes of the federal act. In the circumstances, we believe that congress intended to exclude the indebtedness to the United States in the case before us from the scope of sec. 3466. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, See *United States* v. *Marxen*, 307 U. S. 200, 206. It is therefore our opinion that sec. 3466 is inapplicable in this case to the claims now under consideration."

On rehearing, the government cited four recent cases, two of which are cited in the respondent's brief in opposition in the case at bar. The Supreme Court of Rhode Island, in a modified opinion, reported in 68 R. I. 358, 27 Atl. (2d) 853, considered these cases but refused to retract such previous ruling, saying (page 362):

> "* * * it is urged that the supreme court has recently decided a case which indicates a contrary view to the one we hold. *United States* v. *New York*, No. 238, October Term, 1941, filed March 2, 1942. We have carefully read that case, and, in our opinion, it does not touch upon the precise question here. Moreover, far from being of assistance to the United States in the contention which it makes here, the court seems to entertain a view of the scope and purpose of Title IX that is not unlike what we hold. Thus on page 5, the court, speaking through Mr. Justice Byrnes, says: 'Either the state or the federal government must provide the money to meet the requirements of relief to the unemployed. By his contributions to the state, an

employer has diminished the demand upon the *financial resources of the federal government.* (Italics ours.)

"Another case which has been decided by the supreme court since our former opinion was filed has been cited to us by the United States to show that R. S. § 3466 must be applied to the case at bar. *United States* v. *Emory,* No. 33, October Term, 1941, filed December 15, 1941. That case involved the national housing act. It was contended in that case, among other contentions, that because of the objectives and provisions of that act, congress must have impliedly intended to surrender the priority accorded to the United States under R. S. § 3466. The court rejected this contention but was closely divided.

"Apparently the court divided on the question whether the national housing act ought to be given the same construction with reference to R. S. § 3466 as was given to the national banking act in *Cook County National Bank* v. *United States,* 107 U. S. 445, and to the transportation act of 1920 in *United States* v. *Guaranty Trust Co.,* 280 U. S. 478. In each of those cases it was held that § 3466 was inapplicable because, from the nature of the legislation, congress impliedly intended that the United States should have no priority under that section. The majority in the *Emory* case felt that such intention could not reasonably be found in the national housing act.

"In the case at bar we are concerned with an act which differs widely from the national housing act. That act contains no comparable provisions to Titles VIII and IX of the social security act. The fiscal provisions of both of those titles, as well as the co-operative feature of Title IX, especially distinguish the social security act from the national housing act. Therefore, we do not think that the construction of that act in the *Emory* case is either a precedent or a safe guide for the construction of the social security act in the case at bar.

"The United States has also cited two other very recent cases which, it urges, lend some support to its contention, although neither involved the precise ques-

tion here. *United States* v. *Texas*, U. S. Supreme Court, October Term, 1941, filed December 22, 1941, and *Matter of White Plains Oil Corp.*, N. Y. Court of Appeals, November 27, 1941. We have read each of those cases and we do not think either one assists the United States under the facts of the instant case."

We therefore submit that in view of the intent of Congress as manifested in the Social Security Act and related legislation, Section 3466 of the Revised Statutes is not applicable to give a claim of the United States for Social Security excise taxes a priority over the claim of a State for unemployment compensation contributions when such contributions are exacted under a State statute adopted in accordance with the congressional policy evinced in the Federal act.

II.

THE DEBTOR WAS NOT INSOLVENT WITHIN THE MEANING OF SECTION 3466 OF THE REVISED STATUTES.

Section 3466 of the Revised Statutes (31 U.S.C.A. 191), with which we are here concerned, provides as follows:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

Mere insolvency will not invoke the application of this section. The insolvency contemplated therein must be manifested in one of the modes specified in that statute. As this court, in *United States* v. *Oklahoma*, 261 U. S. 253, took occasion, at page 260, to point out:

> "* * * Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35; *United States* v. *Fisher*, 2 Cranch, 358, 390; *United States* v. *Hooe*, 3 Cranch, 73, 90; *Prince* v. *Bartlett*, 8 Cranch, 431, 433; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 439; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611; *Field* v. *United States*, 9 Pet. 182, 201. * * *"

Except when the estate of a deceased debtor is involved, Section 3466 applies only to three enumerated situations—(1) when the insolvent debtor makes a voluntary assignment of its property; (2) when the property of an absconding, concealed or absent debtor is attached by law; or (3) when an act of bankruptcy is committed. *United States* v. *Oklahoma, supra; Conard* v. *Atlantic Insurance Company, supra; United States* v. *Fisher*, 2 Cranch, 358, 390; *Beaston* v. *Farmers Bank*, 12 Pet. 102, 133-134, 138; *Kennebec Box Company, Inc.* v. *O. S. Richards Corp.*, 299 F. 871, 873; *Nolte* v. *Hudson Navigation Company*, 8 F. (2) 859, 865-866.

The case at bar is not concerned with a voluntary assignment of property or with an absconding, concealed or absent debtor. Consequently, Section 3466 is inapplicable unless it is shown that the debtor committed an act of bankruptcy. Section 21, Chapter 3, Title 11, of the U. S.

Code (11 U. S. C. A. 21) defines an act of bankruptcy as follows:

> "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; or (4) made a general assignment for the benefit of his creditors; or (5) while insolvent or unable to pay his debts as they matured, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt."

The United States does not contend nor is there anything in the record to indicate that the debtor committed an act of bankruptcy as defined under clauses (1), (2), (4) or (6) of the above provision.

Clauses (3) and (5) must, therefore, be considered. Clause (3) applies to a person who suffers or permits, "while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings. . . ." The lien of a judgment against personal property arises at the time the execution is placed in the hands of the bailiff for levy. (Ch. 77, Sec. 9, Ill. Rev. Stat., 1943.) Such execution was placed with the bailiff for levy sometime prior to the filing of petitioner's foreclosure suit (R. 7). In order to show that the debtor committed an act of bankruptcy under

clause (3), the United States was required to establish that the debtor was insolvent at the time the execution was placed with the bailiff for levy. *Citizens Banking Company* v. *Ravenna National Bank,* 234 U. S. 360, 364; *Stitzer Hotel Company* v. *Beyer,* 55 F. (2d) 620, 621; *In Re Ross and O'Brien Iron Works, Inc.,* 58 F. (2d) 961, 962; *In Re Fisher,* 219 F. 638, 639; *In Re McGraw,* 254 F. 442, 446.

Neither the petitioner's foreclosure suit brought on June 29, 1942 (R. 1-9), nor the intervening petition of the United States, filed subsequent to October 28, 1942 (R. 18-19, 43), contain any showing or allegation that the debtor was insolvent when the execution was placed in the hands of the bailiff for levy. The record is devoid of any such evidence. The United States makes no such contention. Plainly, no act of bankruptcy was committed as defined by clause (3).

Clause (5) remains to be considered. Petitioner's foreclosure suit was brought to enforce his statutory lien on the personal property of the debtor, used by it in connection with its business (R. 6). The receivership was merely incidental to the enforcement of the lien. The type of receivership contemplated in clause (5) is one that involves a liquidation of all of the property of the bankrupt within the jurisdiction, and in substance amounts to a general assignment of the bankrupt's assets. *Conard* v. *Atlantic Insurance Company, supra,* p. 439; *Elfast* v. *Lamb,* 111 F. (2d) 434, 436. It does not contemplate a receivership to aid a lienholder in realizing on his lien. *Elfast* v. *Lamb,* 111 Fed. (2) 434, 436; *Duparquet Company* v. *Evans,* 297 U. S. 216, 224; *Standard Accident Insurance Company* v. *Sheftall & Company,* 53 F. (2d) 40, 41. No act of bankruptcy was, therefore, committed, as defined in clause (5).

It should be noted that under clause (5) no act of bankruptcy is committed unless the debtor is insolvent at

the time of the appointment of the receiver. The United States has not shown or alleged that the debtor was insolvent when the receiver was appointed. Its intervening petition, filed approximately four months after the appointment of the receiver, states that "the defendant here *is* insolvent and is unable to pay and discharge in full all of its indebtedness." (R. 18) Petitioner's answer to the said intervening petition merely admitted that the debtor was insolvent as of the date of the said answer (R. 20).

Although petitioner, in his foreclosure suit, alleged that he believed the debtor to be insolvent (R. 7) such an allegation is totally insufficient to constitute insolvency under clause (5).[15]

In *United States* v. *Oklahoma, supra*, this Court, at pages 260-263, took occasion to point out that:

> "* * * the complaint does allege that the bank was and is insolvent. But the word 'insolvent' is used in different senses. * * *
>
> "The allegations of the complaint do not show the debtor to be insolvent within the meaning of § 3466 or of the Bankruptcy Act.
>
> * * *
>
> "The complaint does not expressly allege that the bank committed any act of bankruptcy or state any facts as constituting an act of bankruptcy. * * *
>
> "As insolvency within the meaning of § 3466 was not necessary for the taking of possession by the bank commissioner and is not shown to exist, and as no act of bankruptcy as defined by applicable federal legislation on the subject of bankruptcies or as defined by any law of Oklahoma is shown to have been committed, and as the debtor was not divested of its

[15] "A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." (11 U. S. C. A. 1.)

assets in one of the modes specified in § 3466, the case is not within that section."

Tested by the above principles, the allegations of insolvency in the case at bar were clearly inadequate to sustain the burden which the United States had of showing that the debtor was insolvent within the meaning of Section 3466 at the time of the appointment of the receiver.

Furthermore, the plaintiff's complaint in his foreclosure suit did not request that a general receiver be appointed. The plaintiff stated that: "The personal property subject to the lien herein, being foreclosed, is scant security for the debt due the Director of Labor of the State of Illinois, and unless a receiver be appointed for all of the said property, pending a full and complete hearing upon the issues herein, the plaintiff will suffer financial loss and said property will be wasted" (R. 7). The plaintiff then prayed for the appointment of a receiver for "said property" (R. 9). This is not the type of receivership which is contemplated by Section 3466.

In the case of *Elfast* v. *Lamb*, 111 F. (2d) 434, at page 436, the Circuit Court of Appeals said:

> "The type of receivership contemplated as an act of bankruptcy is one that involves a liquidation of all of the property of the bankrupt within the jurisdiction and in substance amounts to a general assignment of the bankrupt's assets. * * * A receivership in foreclosure does not constitute an act of bankruptcy."

It is therefore submitted that the debtor was not insolvent within the meaning of Section 3466 of the Revised Statutes and that therefore the United States is not entitled to priority under that section.

III.

THE STATE'S LIEN WAS SO SPECIFIC AND SO FAR PERFECTED AS EFFECTIVELY TO EXCLUDE THE FUNDS IN QUESTION FROM THE ESTATE OF THE DEBTOR, AND THEREBY TO DEFEAT THE FEDERAL GOVERNMENT'S RIGHT OF ACCESS TO SUCH FUNDS UNDER SECTION 3466.

Even if it be assumed (1) that Section 3466 is applicable to competing claims by the United States for Social Security excise taxes on one hand, and by a State for unemployment compensation exacted under a State statute adopted in accordance with the congressional policy evinced by the Federal Act on the other, and (2) that the debtor was insolvent within the intendment of Section 3466, nevertheless the United States is not entitled to priority under said section because the lien of the State was so specific and so far perfected as effectively to exclude the funds in question from the estate of the debtor, thereby defeating the Federal Government's right of access to such funds.

1. Where a lien is so specific and so far perfected as effectively to exclude certain property from the estate of the debtor, then, as to such property, the provisions of Section 3466 are not applicable.

One of the earliest (1817) cases mentioning this exception is *Thelusson* v. *Smith*, 15 U. S. (2 Wheat.) 396, where this Court, speaking through Mr. Justice Washington, at page 425, said:

> "The United States are to be first satisfied; but then, it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property

has been seized under a *fi. fa.*, the property is divested out of the debtor, and cannot be made liable to the United States."

In the subsequent case of *Conard* v. *Atlantic Insurance Co.*, 26 U. S. (1 Peters) 386, this Court, through Mr. Justice Story, after quoting the above language from *Thelusson* v. *Smith, supra,* at page 441, said:

"But it has never been decided by this court, that the priority of the United States will divest a specific lien, attached to a thing, whether accompanied by possession or not."

and at page 443, went on to say:

"To this state of things, the language of the court in *Thelusson* v. *Smith* is to be applied, when it is said, that if the debtor's property is seized under a *fi. fa.* it is divested out of the debtor, and cannot be liable to the United States. * * *

"* * * If he (the creditor) possess such a lien, he must enforce it in the manner prescribed by law; and if he does, that may so far affect the assignees actually subjected to such liens. But it gives him no rights to the fund, until he has perfected his lien according to the course of the law. * * * and it is obvious that it (*Thelusson* v. *Smith*) established no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States; since that priority is not of itself equivalent to a lien." (Bracketed material added.)

In *Spokane County* v. *United States*, 279 U. S. 80, 94, 95, this type of exception was again indicated but a decision thereon was reserved.

In *New York* v. *Maclay*, 288 U. S. 290, this exception was again touched upon but decision reserved, this Court saying, at pages 293 and 294:

"The ruling there (*Thelusson* v. *Smith*) was that the general lien of a judgment upon the lands of the

> insolvent debtor is subordinate to the preference established by the statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession. * * * Into these refinements and their consequences there is no need to enter now." (Bracketed material added.)

In *United States* v. *Knott*, 298 U. S. 544, this Court, holding that the lien there involved was inchoate both as to beneficiaries and amounts, at pages 549-551, quoted the above language from *Thelusson* v. *Smith, supra,* and went on to say:

> "Unless the law of Florida effected, at least as early as the date of insolvency, either a transfer of title from the company, or a specific perfected lien in favor of the Florida creditors, the United States is entitled to priority."
>
> "Such an interest lacks the characteristics of a specific perfected lien which alone bars the priority of the United States."

In the more recent case of *United States* v. *Texas*, 314 U. S. 480, this court again recognizes this principle, saying at page 484:

> "Section 3466 mentions no exception to its requirement that 'the debts due to the United States shall be first satisfied.' It is nevertheless true that in several early decisions this Court read an exception into the section in the case of previously executed mortgages. *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612. This doctrine seems to have been based on the theory that mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor. See *Conard* v. *Atlantic Insurance Co., supra*, at 441-442. The question of whether the priority of the United States under § 3466 would also be defeated by a specific and perfected lien upon property, whose title remained in the

debtor was reserved in those cases. *Ibid.*; *Brent* v. *Bank of Washington, supra,* at 611-612. However, it was determined that a general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor. *Thelusson* v. *Smith, supra,* at 425-426."

The Court, in holding that the State's lien in that case was neither specific nor perfected, went on to say, at pages 486-488:

"It is urged, however, that Article 7065a-7 by its own force creates a specific and perfected lien. Support for this contention is said to lie in the fact that the statutory lien purports to affect only the property of the distributor which is 'devoted to or used in his business as a distributor,' rather than his property in general. This is thought to make the lien sufficiently specific. * * *

"With respect to this contention it may first be said that the 'property devoted to or used in his business as a distributor' is neither specific nor constant. But a more important consideration is that the amount of the claim secured by the lien is unliquidated and uncertain. * * *

"* * * As we have indicated, the statutory scheme reveals that the legislature contemplated resort to the courts. * * * while it was clearly intended by Article 7065a-7 to create a lien in favor of the State, we must conclude that of necessity it was nothing more than an inchoate and general lien. * * * Like the tax lien in *New York* v. *Maclay, supra,* it served 'merely as a *caveat* of a more perfect lien to come.' 288 U. S. at 294."

In the recent case of *United States* v. *Waddill Co.*, 323 U. S. 353, this general principle was again recognized by this Court, when it said, at page 355:

"The words of § 3466 are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States. *Thelusson* v. *Smith*, 2 Wheat. 396, 425; *United States* v. *Texas*, *supra*, 484. But this Court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 441, 444; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612; *Spokane County* v. *United States*, 279 U. S. 80, 95; *United States* v. *Knott*, 298 U. S. 544, 551; *New York* v. *Maclay*, *supra*, 293, 294; *United States* v. *Texas*, *supra*, 485, 586. • • •"

In holding that the landlord's lien in that case was neither specific nor perfected, this Court, at pages 357-360, went on to say:

"Tested by its legal effect under Virginia law, the landlord's lien in this instance appeared to serve 'merely as a *caveat* of a more perfect lien to come.' *New York* v. *Maclay*, *supra*, 294. As of the date of the voluntary assignment, it was neither specific nor perfected. It gave the landlord only a general power over unspecified property rather than an actual interest in a definitive portion or portions thereof.

"Specificity was clearly lacking as to the lien on June 19, 1941, the date of the assignment. On that day it was still uncertain whether the landlord would ever assert and insist upon its statutory lien. Until that was done it was impossible to determine the particular six months' rent, or a proportion thereof, upon which the lien was based. • • • Moreover, while the lien legally attached to all such property as might be on the premises when the lien was asserted or within thirty days prior to distraint, the landlord could distrain goods only to the extent necessary to satisfy the rent justly believed to be due, the tenant possessing an action for damages for excessive distraint. Va. Code § 5783; *Fishburne* v. *Engledove*, 91 Va. 548, 22

S. E. 354; *Gurfein* v. *Howell*, 142 Va. 197, 128 S. E. 644. Thus until the extent of the lien was made known by the landlord and until some steps had been taken to distrain or attach sufficient property to satisfy the lien, it was impossible to specify the goods actually and properly subject to the lien. * * * These factors compel the conclusion that neither the rent secured by the lien nor the property subject to the lien was sufficiently specific and ascertainable on the day of the voluntary assignment to fall within the terms of the suggested exception.

"Nor was the statutory lien perfected as a matter of actual fact, regardless of how complete it may have been as a matter of state law. The tenant was divested of neither title nor possession by the silent existence of the landlord's statutory lien on the date of the assignment. Only after the lien was actually asserted and an attachment or a distraint leveled, enabling the landlord to satisfy his claim out of the seized goods, could it be argued that such goods severed themselves from the general and free assets of the tenant from which the claims of the United States were entitled to priority of payment. * * * Something more than a '*caveat* of a more perfect lien to come' was necessary.

"* * * At least until actual distraint, therefore, there was no certainty as to the property subject to the lien and no transfer of title or possession relative to any property. Such a lien cannot be said to be so explicit and perfected on the date of the voluntary assignment as to fall within the claimed exception to the priority of the United States."

2. Under the facts in the instant case, the lien of the State was so specific and had been so far perfected as effectively to exclude certain property from the estate of the debtor, and therefore the proceeds of the sale of such property by the receiver belong exclusively to the State.

Section 26 (a) of the Unemployment Compensation Act of Illinois (Ill. Rev. Stat., 1943, Ch. 48, Par. 243), in pertinent part, provides as follows:

"A lien is hereby created in favor of the Director upon all the personal property on rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due."

The relator is the Director mentioned in the above statute (R. 1). The debtor was an employer within the above statute (R. 1). The claims of the Director under such statute were for certain definite fixed sums, based upon reports filed by the debtor with the Director (R. 3, 4, 9-12). Notices of such liens were duly filed by the Director with the Recorder of Deeds of Cook County, Illinois, as provided by statute, on April 3, 1942; May 8, 1942; and May 20, 1942 (R. 5). On June 3, 1942, an execution was issued on a judgment of the Associated Agencies, Inc., another creditor and the personal property of the debtor subject to the State's lien seized by the bailiff, who threatened to sell the same to satisfy said judgment on June 29, 1942 (R. 6, 7). On June 29, 1942, the Director filed suit in the Circuit Court of Cook County to enjoin such threatened sale, to foreclose the Directors' lien upon such property and to appoint a receiver (R. 1-9). On that same date a receiver was appointed as prayed and the sale by the bailiff enjoined (R. 13, 42). By that time, the Director's lien was not only specific but had been perfected. The Notice of Lien had been filed and recorded. The Lienor, the Director, was specific. The amount due was definite and fixed in amount. The property, subject to the lien, had not only

been excluded from the possession of the debtor but was also fixed and specific and, being in the custody of the bailiff, remained fixed and constant. All substantial aids to the enforcement of the State's lien had been utilized.

We submit that this was not merely "a *caveat* of a more perfect lien to come" but a lien so specific and so far perfected as effectively to exclude such property from the estate of the debtor within the principles laid down in the foregoing cases, and thus to defeat the priority of the United States by defeating its right of access to funds derived by the receiver through the sale of such property.

3. The adverse ruling of the Supreme Court of Illinois was based entirely upon the very dissimilar facts of a companion case and under an erroneous application of this court's ruling in the Waddill case, and may and should be reversed by this court.

A plain reading of the opinion of the Supreme Court of Illinois (R. 42-55), shows that its adverse ruling on this issue was based entirely (1) upon the very dissimilar (as to this issue) facts in a companion case, not upon the facts in the case at bar; and (2) upon this court's ruling in *United States* v. *Waddill Co.*, 323 U. S. 353, which applies to the facts in such companion case but not to such facts as are present in the case at bar.

The only statement of facts made by the Supreme Court of Illinois relating to this issue is as follows (R. 52):

> "It will be remembered that the only thing done by the Director to establish or enforce such lien, as against the property of the debtor, was the filing of this suit on April 2, 1943, whereas the assignment was made by the insolvent debtor on January 9, 1943."

These are the facts in the companion case of *People for the use of Francis B. Murphy, Director of Labor, Appellee,*

v. *Advertising Review Publishing Company, et al.*, (*United States of America, Appellant,*) No. 28490, known in this court as *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner*, v. *United States of America, Respondent*, No. 749 of this term. See R. 1-16 in that case.

The facts in the case at bar are as set forth in the preceding section of this brief and not as indicated by the above quoted statement of the Supreme Court of Illinois. The court has, obviously, confused the facts in the companion case with the facts in this case, which are entirely different.

After stating the facts of the companion case, the Supreme Court of Illinois cites only *United States* v. *Waddill Co.*, 323 U. S. 353, and concludes (R. 55):

> "It seems to us that the above language of the court is conclusive in this case."

While the holding of this Court in the *Waddill* case, *supra*, has application to the facts of the said companion case, it has no application to the facts in the case at bar. The facts and holding of this Court in the said *Waddill* case, *supra*, have been sufficiently discussed in the preceding section (*ante*, pages 37-39) and will not be further discussed here, except to say that under the tests there laid down the lien of the State of Illinois in the instant case was so specific and so far perfected as effectively to exclude this property (and therefore the funds derived from the receiver's sale of such property) from the estate of the debtor, and thereby to defeat the Federal government's right of access to such funds under Section 3466.

In view of the foregoing obvious errors of the Supreme Court of Illinois, we submit that this Honorable Court

should reverse the decision of the Illinois Court. This it has the power to do. As this Court, in the *Waddill* case, *supra*, at page 356, said:

> "But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected as to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress."

IV.

THE CLAIM OF THE STATE OF ILLINOIS FOR UNEMPLOYMENT COMPENSATION CONTRIBUTIONS WAS A SECURED CLAIM AND CONSEQUENTLY WAS ENTITLED TO PRIORITY OVER THE UNSECURED CLAIM OF THE UNITED STATES FOR SOCIAL SECURITY EXCISE TAXES.

The foregoing arguments demonstrate that the United States is not entitled to priority under the provisions of Section 3466 of the Revised Statutes. It is a well established rule that the priority of the United States, if any there be, must rest upon a specific statutory provision, and does not obtain merely by virtue of its sovereign prerogatives. *Price* v. *United States*, 269 U. S. 492, 499; *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236, 239, *United States* v. *Oklahoma*, 261 U. S. 253, 259.

In the case at bar, the State of Illinois, through its Director of Labor, had secured a lien under the provisions of Section 26 (a) of the Unemployment Compensation Act of Illinois (Ill. Rev. Stats., 1943, Ch. 48, Par. 243), which, in pertinent part, provides as follows:

> "A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by

him in connection with his trade, occupation, profession or business from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due."

The debtor was an employer under this statute (R. 1) and the Director's claim against the debtor thereunder was fixed and determined in amount and was based on returns filed by the debtor wtih the Director (R. 3, 4, 9-12). Notices of such liens had been filed by the Director with the Recorder of Deeds as provided by Statute (R. 5). The debtor had been deprived of the possession of the property upon which these liens had attached (R. 6, 7). Since such property was in the hands of the Bailiff, it was both fixed and constant (R. 6, 7). All of these steps had been completed *prior* to any allegations of insolvency (R. 1-9).

Under this statute, the Director's claim was secured by a lien which had attached to all of the personal property used by the debtor in connection with its business. The debtor was a corporation and could only own such personal property as was appropriate to the transaction of its business. Ch. 32, Sec. 157.5 (d), Ill. Rev. Stat., 1943; *Bixler* v. *Summerfield*, 195 Ill. 147, 153; *People* v. *Chicago Gas Trust Company*, 130 Ill. 268, 287. In the absence of any evidence to the contrary it is, of course, to be presumed that the personal property of the debtor which had been seized by the Bailiff and by him turned over to the receiver was property which the debtor had used in connection with its business and was therefore subject to the State's lien for unemployment contributions. The rule is well settled that

a trustee or receiver takes such property subject to the lien of the petitioner, *Hooven* v. *Burdette*, 153 Ill. 672, 679.

It is therefore submitted that the claim of the State of Illinois for unemployment contributions was secured by a lien upon the personal property which the receiver received from the Bailiff and that this lien attaches to the funds derived by the receiver from the sale of such property.

In the case at bar the United States does not contend, nor is there evidence in the record to indicate that its claims were secured by a lien. Section 3466 does not, in itself, create any lien. *United States* v. *Texas*, 261 U. S. 253, 259.

In *Rivard* v. *Bijou Furniture Company*, 67 R. I. 251, 21 Atl. (2d) 563, 68 R. I. 385, 27 Atl. (2d), the Supreme Court of Rhode Island held that the claims of the state for unemployment compensation contributions and the claim of the United States for federal insurance contributions and capital stock taxes were entitled to parity. However, the court there specifically noted in its opinion that no liens were involved (67 R. I. 253, 21 Atl. (2d) 565). In that respect that case is distinguishable from the case at bar and is therefore not applicable to the issue here presented.

In view of the above, it is submitted that the claim of the State of Illinois for unemployment compensation contributions was a secured claim and consequently was entitled to priority over the unsecured claim of the United States for Social Security excise taxes.

CONCLUSION.

In view of the foregoing, it is respectfully submitted (1) that Section 3466 of the Revised Statutes is not applicable to give a claim of the United States for Social Security excise taxes a priority over a claim of the State of Illinois for unemployment compensation contributions exacted under an Illinois statute adopted in accordance with the congressional policy evinced in the Social Security Act and related legislation; (2) that the debtor was not insolvent within the meaning of Section 3466 of the Revised Statutes; (3) that the State's lien was so specific and so far perfected as effectively to exclude the funds in question from the estate of the debtor and thereby to defeat the Federal government's right of access to such funds under Section 3466; and (4) that the claim of the State of Illinois for unemployment compensation contributions was a secured claim and was consequently entitled to priority over the unsecured claim of the United States for Social Security excise taxes.

Petitioner therefore prays that the said final judgment, opinion and decision of the Supreme Court of Illinois be reversed, with such further orders as may be deemed appropriate.

Respectfully submitted,

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APPENDIX.

Section 3466 of the Revised Statutes of the United States.

(31 U. S. C. A. 191.)

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

THE SOCIAL SECURITY ACT.

Ch. 531, 49 Stat. 620.

* * * * * * *

Title III—Grants to States for Unemployment Compensation Administration.

Appropriation.

Section 301. For the purpose of assisting the States in the administration of their unemployment compensation laws, there is hereby authorized to be appropriated, for the fiscal year ending June 30, 1936, the sum of $4,000,000, and for each fiscal year thereafter the sum of $49,000,000, to be used as hereinafter provided.

Payments to States.

Sec. 302(a). The Board shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Board under Title IX, such amounts as the Board determines to be necessary for the proper administration of such law during the fiscal year in which such payment is to be made. The Board's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and of the cost of proper administration of such law; and (3) such other factors as the Board finds relevant. The Board shall not certify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year.

(b) Out of the sums appropriated therefor, the Secretary of the Treasury shall, upon receiving a certification under subsection (a), pay through the Division of Disbursement of the Treasury Department and prior to audit or settlement by the General Accounting Office, to the State agency charged with the administration of such law the amount so certified.

Provisions of State Laws.

Sec. 303 (a). The Board shall make no certification for payment to any State unless it finds that the law of such State, approved by the Board under Title IX, includes provisions for—

(1) Such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be reasonably

calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices in the State or such other agencies as the Board may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State, immediately upon such receipt, to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904; and

(5) Expenditure of all money requisitioned by the State agency from the Unemployment Trust fund, in the payment of unemployment compensation, exclusive of expenses of administration; and

(6) The making of such reports, in such form and containing such information, as the Board may from time to time require, and compliance with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law.

(b) Whenever the Board, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a);

the Board shall notify such State agency that further payments will not be made to the State until the Board is satisfied that there is no longer any such denial or failure to comply. Until it is so satisfied it shall make no further certification to the Secretary of the Treasury with respect to such State.

* * * * * *

TITLE VII—SOCIAL SECURITY BOARD.

Establishment.

Section 701. There is hereby established a Social Security Board (in this Act referred to as the "Board") to be composed of three members to be appointed by the President, by and with the advice and consent of the Senate. During his term of membership on the Board, no member shall engage in any other business, vocation, or employment. Not more than two of the members of the Board shall be members of the same political party. Each member shall receive a salary at the rate of $10,000 a year and shall hold office for a term of six years, except that (1) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his pedecessor was appointed, shall be appointed for the remainder of such term; and (2) the terms of office of the members first taking office after the date of the enactment of this Act shall expire, as designated by the President at the time of appointment, one at the end of two years, one at the end of

four years, and one at the end of six years, after the date of the enactment of this Act. The President shall designate one of the members as the chairman of the Board.

Duties of Social Security Board.

Sec. 702. The Board shall perform the duties imposed upon it by this Act and shall also have the duty of studying and making recommendations as to the most effective methods of providing economic security through social insurance and as to legislation and matters of administrative policy concerning old-age pensions, unemployment compensation, accident compensation, and related subjects.

Expenses of the Board.

Section 703. The Board is authorized to appoint and fix the compensation of such officers and employees, and to make such expenditures, as may be necessary for carrying out its functions under this Act. Appointments of attorneys and experts may be made without regard to the civil-service laws.

Reports.

Sec. 704. The Board shall make a full report to Congress, at the beginning of each regular session, of the administration of the functions with which it is charged.

* * * * * * *

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE.

Imposition of Tax.

Section 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum.

Credit Against Tax.

Sec. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903.

Certification of State Laws.

Sec. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that—

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve;

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organizations;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time. The Board shall, upon approving such law, notify the Governor of the State of its approval.

(b) On December 31 in each taxable year the Board shall certify to the Secretary of the Treasury each State whose law it has previously approved, except that it shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Board finds has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provisions.

(c) If, at any time during the taxable year, the Board has reason to believe that a State whose law it has previously approved, may not be certified under subsection (b), it shall promptly so notify the Governor of such State.

Unemployment Trust Fund.

Sec. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund," hereinafter in this title called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judg-

ment, required to meet current withdrawals. Such investments may be made only in interest bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 per centum next lower than such average rate. Obligations other that such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition.

(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book

account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment.

* * * * * * *

Interstate Commerce.

Sec. 906. No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.

Definitions.

Sec. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(d) The term "State agency" means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

(e) The term "unemployment fund" means a special fund, established under a State law and administered by a State agency, for the payment of compensation.

(f) The term "contributions" means payments required by a State law to be made by an employer into an unemployment fund, to the extent that such payments are made by him without any part thereof being deducted or deductible from the wages of individuals in his employ.

(g) The term "compensation" means cash benefits payable to individuals with respect to their unemployment.

ILLINOIS UNEMPLOYMENT COMPENSATION ACT.

Ch. 48, Sec. 243, Ill. Rev. Stat., 1943

§26. LIEN CREATED UPON ASSETS OF EMPLOYER—COMMENCEMENT—LIMITATION.) (a) A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. In all cases where a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that the determination and assessment of the Director made pursuant to the provisions of this Act become final.

INNOCENT PURCHASER — RECORDATION — WITHDRAWAL OF NOTICE.

(b) (1) Such lien shall be invalid only as to any innocent purchaser for value of stock in trade of any employer in the usual course of such employer's business, and shall be invalid as to any innocent purchaser for value of any of the other assets to which such lien has attached, unless notice thereof has been filed by the Director in the office of the Recorder of Deeds of the county within which the property subject to the lien is situated. The Director may, in his discretion, for good cause shown, issue a certificate of withdrawal of notice of lien filed against any employer, which certificate shall be recorded in the same manner as herein provided for the recording of notice of liens. Such withdrawal of notice of lien shall invalidate such lien as against any person acquiring any of such employers' property or any interest therein, subsequent to the recordation of the withdrawal of notice of lien, but shall not otherwise affect the validity of such lien, nor shall it prevent the Director from re-recording notice of such lien. In the event notice of such lien is re-recorded, such notice shall be effective as against third persons only as of the date of such re-recordation.

FILING OF NOTICE—LIEN INDEX

(2) The Recorder of Deeds of each county shall procure at the expense of the county a file labeled "Unemployment Compensation Contribution Lien Notices" and an index book labeled "Unemployment Compensation Contribution Lien Index." When a notice of any such lien is presented to him for filing, he shall file it in numerical order in the file and shall enter it alphabetically in the index. The entry

shall show the name, and last known business address of the employer named in the notice, the serial number of the notice, the date and hour of filing, and the amount of contribution, interest and penalty thereon due and unpaid. When a certificate of complete or partial release of such lien issued by the Director is presented for filing in the office of the Recorder of Deeds where a notice of lien was filed, the Recorder shall permanently attach the certificate of release to the notice of lien and shall enter the certificate of release and the date in the Unemployment Compensation Contribution Lien Index on the line where the notice of lien is entered.

* * * * * *

PRIORITY OF LIEN.

(d) The lien herein created in favor of the Director shall be prior to all other liens whether general or specific, and shall be inferior only to any claim for wages filed pursuant to "An Act to protect employees and laborers in their claims for wages" approved June 15, 1887, as amended, in an amount not exceeding $250.00 for work performed within six months from the date of filing such claim, and to such liens as shall attach prior to the filing of Notice of Lien by the Director with the Recorder of Deeds as provided in this Act; provided, however, that in all cases where statutory provision is made for the recordation or other public notice of a lien, the lien of the Director shall be inferior only to such liens as shall have been duly recorded, or of which public notice shall have been duly given, in the manner provided by such statute, prior to the filing of notice of lien by the Director with the Recorder of Deeds as in this Act provided.

FORECLOSURE OF LIEN.

(e) In addition and as an alternative to any other remedy provided by this Act, or by the laws of the State of Illinois, the Director may enforce the lien herein created by petition in the name of the People of the State of Illinois to the Circuit Court of the county wherein the property subject to the lien is situated, praying that the lien which has attached to said property, be foreclosed and the aforesaid property be sold in the same manner as in cases of foreclosure of mortgages upon personal property in courts of record. In all such cases, it shall not be necessary that said petition described the property to which said lien has attached and it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, of all personal property and rights thereto which he owned at the time the contributions, upon which the lien sought to be foreclosed is based, became due, or which he subsequently acquired, indicating upon such schedule the property so owned by such employer which was, or is used by such employer in connection with his trade, occupation, profession or business, and if such employer shall so fail to do after having been so ordered by the court, he may be punished as in other cases of contempt of court.

The court in which such proceedings shall be pending may issue such process, make such orders requiring the parties to appear and require such notice to be given as is, or may be made, in other civil actions and shall have the same power and jurisdiction of the parties in such matter, and the rules of practice shall be the same as in other civil cases except as is otherwise provided by this Act.

Upon sale of the aforesaid personal property, the proceeds shall be applied to the payment of the costs incurred in the proceeding; the satisfaction of such liens as have attached to said property in the order of their priority and the balance, if any, to such parties as the court shall find to be entitled thereto. The Director is hereby empowered to bid at any sale conducted pursuant to the provisions of this Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

REPLY BRIEF FOR PETITIONER.

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CHAMPLIN SHEALY COMPANY, CHICAGO — No. 368

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
ROBERT L. GORDON, Director of Labor,
Petitioner,

vs.

NIGEL D. CAMPBELL, Collector of Internal Revenue,
Respondent.

REPLY BRIEF FOR PETITIONER.

I.

As in the brief in No. 749, respondent erroneously assumes that the State contends that the United States is not entitled to priority because

> "Congress intended to exclude the federal social security taxes from the scope of Section 3455."

Respondent also erroneously assumes that the State contends that such taxes by the Federal government are not debts within the meaning of Section 3466.

As we make clear under Point I of our reply in case No 749, we do *not* make the contentions above described. What

we *do* contend is that Congress by the enactment of the Social Security Act and related legislation has manifested an intention that the priority of the United States under Section 3466 *shall not apply as against claims of the States for unemployment compensation taxes* exacted under State statutes adopted in accordance with the congressional policy evinced in the Federal statute.

Instead of repeating the argument presented under Point I of the brief for respondent in No. 749, respondent merely incorporates by reference the argument there presented. We likewise here incorporate by reference the reply to be found under Point I of our reply in No. 749.

One additional factor, however, requires further comment. In a footnote respondent points out that $229.91 of its total claims of $1,954.07 (R. 15, 17) represents employee's taxes imposed under Section 1400 of the Internal Revenue Code (Sec. 801 of Title VIII of the Social Security Act) and required to be collected by the employer by withholding such amounts from the wages of the employees. From these provisions and from the further provisions of Sections 1439 and 3661 of the Internal Revenue Code, respondent contends that such amounts constitute a special fund in trust for the United States, are therefore not a part of the general assets of the debtor and are therefore payable to the United States in any event prior to the payment of all other claims.

This does not follow unless it also appears that such sums were in fact collected by the employer from its employees or were in fact withheld from their wages by the employer. There is no allegation or proof that such funds were actually collected by the employer or were withheld by the employer from the wages of its employees, consequently no trust fund existed in this case.

II.

Respondent has simplified the argument under this Point by conceding that Section 3466 is not applicable unless it is shown that the debtor committed an act of bankruptcy and that the only definition of an act of bankruptcy pertinent to the facts in this case is where a debtor has

> "(5) while insolvent or unable to pay his debts as they mature, procured, permitted or suffered voluntarily or involuntarily the appointment of a receiver to take charge of his property."

Respondent also appears to concede that the Director's foreclosure suit sought only a receiver for such personal property as was covered by his lien, and admits that *Elfast* v. *Lamb*, 111 F. (2d) 434, and cases there cited, hold that a receivership in aid of a foreclosure does not constitute an act of bankruptcy, but impliedly challenges these decisions.

Respondent rests for the most part upon the contention that even though the Director's suit started out as a receivership in aid of a foreclosure, it was expanded into a general equity receivership by the court's order which directed the receiver to

> "take charge of the premises and the business, property and assets contained therein located at 1234 North Halsted Street, Chicago, Illinois."

Respondent then cites *United States* v *Texas*, 314 U. S. 480, where a receivership in aid of a foreclosure of a chattel mortgage was expanded so as to bring in all other property of the debtor and this court held that this subsequent action converted the proceedings into a general equity receivership within the scope of Section 3466.

The flaw in respondent's argument is that although the order appointing the receiver did use rather general language, there is no allegation or evidence that any property of the debtor, *other* than that covered by the Director's lien (which extended to all personal property used by the debtor in the prosecution of its business), was actually brought into the receivership. Since the debtor corporation could only own personal property appropriate to the prosecution of its business and there is no suggestion that it owned any realty, it must be presumed that the only property turned over to the receiver was that covered by the Director's lien.

Thus, despite the general language of the order appointing the receiver, the receivership in fact continued as it had commenced, merely a receivership in aid of a foreclosure, which, under the cases, does not constitute an act of bankruptcy.

Respondent concedes that the cases of *United States* v. *Emory*, 314 U. S. 425; *Price* v. *United States*, 207 U. S. 492; and *United States* v. *Butterworth Corp.*, 269 U. S. 504, cited by it, were all receiverships instituted by unsecured general creditors. These cases are therefore not pertinent to the issue here presented.

III.

In answer to our contention that the lien of the Director was so specific and so far perfected as effectively to exclude the funds in question from the estate of the debtor, respondent first contends that the decision of the Supreme Court of Illinois was based upon the facts in this case and is conclusive upon this court as a determination of a matter of State law.

Although, as respondent points out, the Illinois court did in the beginning of its opinion state the facts in both

cases, it is likewise true, as we state in our original brief (p. 41), that the court in passing on this issue relied entirely upon the facts in the *companion* case and does not in any way mention the facts in *this* case. Thus it is obvious that the Supreme Court of Illinois did *not* actually adjudicate this issue with respect to the facts of the case at bar.

The question of whether or not the lien was so specific and so far perfected as to exclude the funds in question from the estate of the debtor and thus to render inapplicable the provisions of Section 3466, is not a matter of *State* law; it is a matter of *Federal* law. The court's remark (R. 55) to the effect that it deemed this Court's language in *United States* v. *Waddill Company*, 323 U. S. 353, as conclusive upon it in this case, indicates that it was considered to be a *Federal*, not a *State* question, and one to be determined under the law laid down by the *Federal* courts.

As this Court, in the *Waddill* case, *supra*, at page 356 said:

> "But it is a matter of *Federal* law as to whether a lien created by State statute is sufficiently specific and perfected as to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress." (Italics added.)

We therefore submit that this Court is not precluded from examining and passing upon the propriety of this ruling by the Supreme Court of Illinois.

Although respondent concedes that this Court has repeatedly held that Section 3466 is not applicable with respect to property previously mortgaged (on the theory that the mortgaged property has passed to the mortgagee and is therefore no longer a part of the estate of the debtor); and concedes, as this Court said in *Conard* v. *Atlantic Insurance Co.*, 26 U. S. (1 Peters) 386, 441, 443, that

> "It has never been decided by this Court, that the priority of the United States will divest a specific lien, attached to a thing, whether accompanied by possession or not."

respondent urges that this Court hold that *in no event* can the priority of the United States under Section 3466 be defeated *even by a specific and completely perfected lien*, and seems to imply that this super-priority should even be so far extended as to defeat the rights of mortgagees under previously executed mortgages.

This conclusion follows, respondent says, from the fact that Section 3466

> "is all inclusive and on its face admits of no exception to the priority of claims of the United States in the distribution of an insolvent estate."

The basic flaw in this argument, as this Court points out in *Thelusson* v. *Smith*, 15 U. S. (2 Wheat.) 396, 425, is that

> "The United States are to be first satisfied; but then it must be out of the debtor's estate."

The cases hold, as this Court noted in *United States* v. *Texas*, 314 U. S. 480, 484, that

> "mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor."

To hold otherwise would destroy the stability of our entire financial system, which is based upon the validity of previously executed mortgages as against all subsequent claims of whatsoever nature.

This same proposition applies to specific and perfected liens upon personal property. All that the debtor owns, even though he may be allowed to continue in the possession of the property, is an equitable interest in the value of the property after the payment of the claim secured by the lien.

While, as has been noted, *this* Court has always reserved decision as to whether a specific and perfected lien (excluding mortgages) would so operate to exclude the property covered by the lien from the estate of the debtor and thus, as to the property so excluded, defeat the Federal government's claim to priority under Section 3466, this exact issue has been decided adversely to the United States by the Supreme Court of Michigan in the case of *In re Ever Krisp Food Products Co.*, 307 Mich. 182 (1943), repeatedly cited by respondent in its brief. There, in holding that certain liens of the city and county for personal property taxes were specific and perfected and therefore defeated the claim of the United States to priority under Section 3466, that court, at page 196, said:

> "If a Federal tax lien cannot be displaced by a later tax lien imposed by State law, *a fortiori* reason indicates that a *specific and perfected tax lien* imposed by State law should not be displaced by a later priority claim (not a lien) asserted under Federal authority.
>
> "* * * The value of the property at all times is the value less the amount of any specific perfected liens. The property therefore passes to the receiver burdened with the city and county liens, its value as a property reduced by the amount of those specific perfected liens."

And concluded at page 212, that:

> "These city and county tax liens are superior to the claim of the United States for priority as to social security taxes and capital stock taxes."

Another State court decision on this point is *Ernst* v. *Guarantee Millwork, Inc.*, 200 Wash. 195, 93 Pac. (2d) 404, where the Supreme Court of Washington held that the claims of the United States to priority under Section 3466 for social security taxes were defeated by a specific and perfected lien of the county for personal property taxes.

We submit that this court should hold that the claim of the State of Illinois was so specific and so far perfected as effectively to exclude the funds in question from the estate of the debtor, and that by reason of such exclusion the priority of the United States could not and did not apply to such funds.

CONCLUSION

In view of the foregoing, we submit that the decision of the Supreme Court of Illinois is erroneous and should be reversed by this Court.

Respectfully submitted,

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Attorney General of the State of Illinois,
Attorney for Petitioner.

ALBERT E. HALLETT,
Assistant Attorney General,
Of Counsel.

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No. 760 35

In the Supreme Court of the United States

OCTOBER TERM, 1945

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ROBERT L. GORDON, DIRECTOR OF LABOR, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ROBERT L. GORDON, DIRECTOR OF LABOR, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Circuit Court of Cook County, Illinois, rendered no opinion. The opinion of the Supreme Court of Illinois (R. 42–55) is reported in 391 Ill. 29.

JURISDICTION

The amended judgment of the Supreme Court of Illinois was rendered on September 17, 1945. (R. 42, 56). The time for filing a petition for a writ of certiorari was extended by this Court until January 16, 1946. (R. 57). The petition for

writ of certiorari was filed January 15, 1946. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the claim of the United States against the Chicago Waste and Textile Company for unpaid federal unemployment compensation taxes and federal insurance contribution taxes is entitled to priority by virtue of Section 3466, Revised Statutes, over the claims of petitioner against the company for unpaid unemployment compensation contributions levied by Illinois statute.

STATUTES INVOLVED

Revised Statutes:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as

to cases in which an act of bankruptcy is committed.
(31 U. S. C. 191.)

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 602. CREDIT AGAINST FEDERAL UNEMPLOYMENT TAXES FOR YEARS 1936 TO 1942.

* * * * *

(b) *Allowance of Credit Against Tax for 1939, 1940, 1941, and 1942 Where Assets in Control of Court.*—Against the tax imposed by the Federal Unemployment Tax Act for the calendar year 1939, 1940, 1941, or 1942, any taxpayer shall be allowed credit for the amount of contributions paid by him into an unemployment fund under a State law, without regard to the date of payment, if the assets of the taxpayer were, at any time during the period from the last day upon which the taxpayer was required under section 1604 of the Federal Unemployment Tax Act to file a return of the tax against which credit is claimed to June 30 next following such last day, inclusive * * * in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction. * * *

Illinois Unemployment Compensation Act (Jones Illinois Statutes Annotated (1944), Sec. 45.154):

SEC. 26. (a) Lien created upon assets of employer-Commencement-Limitations.) A lien is hereby created in favor of the Di-

rector upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. * * *

STATEMENT

On June 29, 1942, the Director of Labor of the State of Illinois filed suit in the Circuit Court of Cook County to foreclose a statutory lien against the Chicago Waste and Textile Company for Illinois unemployment compensation taxes due. (R. 1–12). The taxes due amounted to $788.45 and notice of lien granted by Section 26 (a) of the Illinois Unemployment Compensation Act had previously been filed with the Recorder of Deeds of Cook County, Illinois. (R. 10–12). The complaint alleged that the property of the debtor was about to be sold at public auction in execution of a judgment held by Associated Agencies, Inc., against the debtor and requested an injunction restraining such sale. (R. 7–8). The complaint, alleging the debtor to be insolvent, also requested the appointment of a receiver to liquidate the as-

sets of the company. (R. 7, 9). As prayed, a receiver was appointed and an injunction granted. (R. 13).

Thereafter, Carter H. Harrison, Collector of Internal Revenue, filed claims in the proceeding for federal unemployment compensation taxes, amounting to $1,431.16, plus interest, and for federal insurance contribution taxes amounting to $522.91, plus interest due from the Chicago Waste and Textile Company. (R. 14–18.) Subsequently, the Collector filed an intervening petition alleging the insolvency of the Chicago Waste and Textile Company and claiming priority of payment for his claims by virtue of Section 3466, Revised Statutes. (R. 18–19.) The answer of the Director of Labor admitted the insolvency but asserted that his own claim was entitled to priority under his lien. (R. 19–21.)

A net balance of $677.81 was realized from the liquidation of the property of the company by the receiver. This sum was ordered deposited with the Clerk of the Circuit Court, subject to further orders of the court. (R. 21–22.)

Following a hearing, the Circuit Court of Cook County, Illinois, ordered that 90 percent of the funds on deposit be turned over to the state and the remaining ten percent to the Collector. (R. 22.)

The Collector appealed and the Supreme Court of Illinois held that under Section 3466, Revised Statutes, he was entitled to receive 100 percent

priority on the claim for federal insurance contributions and any balance remaining was to be paid to the Director of Labor and credited against the claim of the United States for federal unemployment taxes. (R. 42–45.) The court recognized the applicability of Section 3466, Revised Statutes, to the federal taxes but distinguished between the claim for federal insurance contribution taxes and the claim for federal unemployment compensation taxes on the ground that under Section 602 (b) of the Revenue Act of 1943, the receiver of the debtor was authorized to pay the latter taxes to the state and to credit against taxes due the Federal Government for the amounts paid to the state up to 90 percent of the taxes due the Federal Government. (R. 44–45, 55.) A petition for rehearing was denied on September 17, 1945. (R. 41.)

ARGUMENT

The decision below is in accord with established principles that have so recently been announced by this Court as not to warrant further consideration at this time of the issues involved. *United States* v. *New York*, 315 U. S. 510.

The court below was clearly right in upholding the principle of federal priority under Section 3466 of federal insurance contribution tax claims over state unemployment compensation tax claims, and in holding that federal unemployment compensation taxes are likewise entitled to priority. Sec-

tion 3466, Revised Statutes, *supra*, provides that whenever any person indebted to the United States is insolvent, the debts due to the United States shall first be satisfied. Under this provision, federal taxes due and accrued at the time of institution of the receivership proceedings have been held debts, and uniformly have received priority over competing state and local tax claims. *United States* v. *Texas*, 314 U. S. 480; *Price* v. *United States*, 269 U. S. 492; *Stripe* v. *United States*, 269 U. S. 503; *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290. Federal insurance contribution taxes and unemployment compensation taxes are valid excise taxes. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *United States* v. *New York*, *supra*. And this Court has upheld under Section 3466 the priority of federal unemployment compensation tax claims over a landlord's rent lien under Virginia law and a claim for municipal taxes. *United States* v. *Waddill Co.*, 323 U. S. 353.

Social security taxes levied under the federal statute create claims which are separate and distinct from unemployment compensation claims arising under state acts, and are nonetheless so because a common social objective underlies both state and federal acts. Cf. *United States* v. *New York*, *supra*. That the federal act permits nondelinquent taxpayers to take credits against the federal unemployment compensation taxes due (up to 90 percent thereof) equal to the amounts

paid into an approved state unemployment compensation fund, encourages taxpayers promptly to satisfy their state tax obligations, but does not alter the nature of the tax as a federal obligation. The full amount of the taxes levied are debts due the United States and fall within the scope of Section 3466. *Matter of White Plains Oil Corp.*, 287 N. Y. 141. State unemployment compensation claims do not acquire the status of federal claims merely because the state and federal governments collect the taxes as part of the same broad program. Section 3466 had long been on the books when the federal social security legislation was enacted. Had Congress intended, in the case of competing state and federal social security tax claims, to waive the priority historically enjoyed by all other federal tax claims, such intention would not have been left to inference and conjecture.

The court below correctly disposed of the remaining issues raised in the petition. The court rejected petitioner's argument that he held a specific and perfected lien and found instead that under Section 26 (a) of the Illinois Unemployment Compensation Act he held only a general inchoate lien. This finding was entirely in accord with the principle laid down in *United States* v. *Waddill Co., supra,* upon which case the court specifically relied. The court also rejected petitioner's contention (Br. 25–28) that the Chicago Waste and Textile Company was not insolvent

within the meaning of Section 3466, Revised Statutes. This contention finds adequate refutation in the pleadings: (a) The original complaint filed by the state sought the appointment of a receiver on the ground that the company was believed insolvent, and this allegation of insolvency was never denied; (b) the original complaint requested an injunction restraining a judgment creditor (and the bailiff into whose hands the judgment had been placed for execution) from selling the property of the company at public auction to satisfy the judgment, it being alleged, without denial, that such sale was scheduled for the same day the complaint was filed; (c) the intervening petition filed by the Collector of Internal Revenue alleged, and the State's answer thereto admitted the insolvency of the taxpayer company. In view of these facts we think it clear that the Chicago Waste and Textile Company was insolvent within the meaning of Section 3466. *Spokane County* v. *United States, supra; cf. Price* v. *United States,* 269 U. S. 492, 502.

Such conflict as there is involves certain aspects of *Rivard* v. *Bijou Furniture Co.,* 67 R. I. 251, modified, 68 R. I. 358, which is clearly erroneous under rulings of this Court; this conflict does not call for review by this Court.[1] Cf. Rule 38 (5) (a).

[1] The files of the Department of Justice show that, although the *Rivard* decision was regarded as erroneous, the Government did not ask for certiorari because of the negligible amount involved.

Moreover, the *Rivard* case is not in conflict with the ruling below on any issue adversely affecting the State of Illinois except insofar as the court below held that the Federal Government was entitled to priority in respect of federal insurance contributions tax levied under subchapter A of Chapter 9 of the Internal Revenue Code. Unlike the instant case, the *Rivard* case did not involve any federal unemployment insurance tax claims under subchapter C of Chapter 9 of the Internal Revenue Code, and any comment of the court with respect to such taxes must be regarded as mere dictum. Moreover, no contention was there made that the state held a specific and perfected lien which barred federal priority under Section 3466, and the insolvency of the taxpayer was not questioned. Further, in this case the State's claim was given priority in fact over the federal claim for unemployment compensation taxes, since the court below ordered that after the payment of federal insurance contribution taxes with lawful interest thereon to the Federal Government, the remaining available funds were to be paid to the state and credited against the federal unemployment compensation tax claim.[2]

[2] Significantly, if the principle of the *Rivard* case were extended to include federal unemployment insurance tax claims, the State in this case would not have received the entire amount available in the fund, as here, but state and federal claims would have shared on the basis of equal priority.

While we think the court below erred in failing to order payment to the Federal Government of the federal unem-

With respect to federal insurance contribution taxes, there is admittedly a conflict between this case and the *Rivard* case, for there the court decided that the federal claim for federal insurance contribution taxes was not entitled to priority under Section 3466 over the claim of the state for unemployment compensation taxes, but that both claims had co-equal status. We believe, however, that the *Rivard* case cannot be reconciled with the holding of this Court in *United States* v. *New York,* 315 U. S. 510. While the *New York* case did not involve Section 3466, it does establish that claims for federal insurance contribution taxes are separate and distinct from claims for contribu-

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ployment compensation taxes as well as federal insurance contribution taxes, no petition for certiorari has been filed for the reason that the fund will be practically exhausted by the payment to the Federal Government of federal insurance contribution taxes.

Section 602 (b) of the Revenue Act of 1943, *supra,* does not warrant, as the court below assumed, payment to the state coupled with a credit on the federal unemployment compensation tax claim. *Matter of White Plains Oil Corp.,* 287 N. Y. 141. Section 602 (b) merely provides an extension of time during which receivers may claim the 90 percent credit for payments made to approved state bodies. The amount of the federal claim for unemployment compensation taxes is not affected by this provision and application of the priority would have required the court to order that all the available funds be paid to the Collector. In any case, since no credit was possible for ten percent of the federal claim, that amount certainly should have been paid to the Collector before any funds were paid to the state. Payment of this ten percent would have exhausted the fund, and question of the proper disposition of the remaining 90 percent would then have been moot.

tions arising under state unemployment compensation statutes. The *Rivard* case glossed over this duality on the broad ground that the social security program is a joint federal-state venture with a common social objective. The original decision in the *Rivard* case was rendered before the decision in the *New York* case was announced, and although the *New York* case was brought to the court's attention on reargument, the court adhered to the views expressed in the first opinion. We think any conflict between the *Rivard* case and the present case is unimportant because of this Court's decision in the *New York* case.

CONCLUSION

The interpretation of Section 3466 by the court below is correct and in view of this Court's decision in *United States* v. *New York, supra,* the conflict between this case and *Rivard* v. *Bijou Furniture Co., supra,* does not call for any review by this Court. The petition should therefore be denied.

Respectfully submitted.

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No. 760

In the Supreme Court of the United States

OCTOBER TERM, 1945

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ROBERT L. GORDON, DIRECTOR OF LABOR, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 750

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ROBERT L. GORDON, DIRECTOR OF LABOR, PETITIONER

v.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The Circuit Court of Cook County, Illinois, rendered no opinion. The opinion of the Supreme Court of Illinois (R. 42–55) is reported in 391 Ill. 29.

JURISDICTION

The amended judgment of the Supreme Court of Illinois was rendered on September 17, 1945. (R. 42, 56.) The time for filing a petition for a writ of certiorari was extended by this Court until January 16, 1946. (R. 57.) The petition for

a writ of certiorari was filed January 15, 1946, and was granted February 25, 1946. (R. 58.) The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the claim of the United States against the Chicago Waste and Textile Company for unpaid federal insurance contribution taxes is entitled to priority, by virtue of Section 3466 of the Revised Statutes, over the claim of the State of Illinois against the company for unpaid unemployment compensation contributions levied by Illinois statute.

STATUTES INVOLVED

The statutes involved are printed in the Appendix, *infra*, pp. 23–27.

STATEMENT

The facts may be stated as follows:

On June 29, 1942, the Director of Labor of the State of Illinois filed suit in the Circuit Court of Cook County, Illinois, to enforce a statutory lien arising under Section 26 (a) of the Illinois Unemployment Compensation Act, against the Chicago Waste and Textile Company for Illinois unemployment compensation contributions. (R. 1–12). The contributions and penalties claimed to be due were in the amount of $767.29 (R. 8), although notices of liens had previously been filed

for taxes, interest, and penalties in the total amount of $788.45 (R. 9–12).

The complaint alleged, *inter alia*, that Associated Agencies, Inc., a corporation, had obtained a judgment in the Municipal Court of Chicago against the Chicago Waste and Textile Company; that execution had been issued on the judgment on June 3, 1942, a date which was subsequent to the dates on which the Director had filed notices of liens; and that the property of the debtor was to be sold at public auction on June 29, 1942, by the bailiff of the Municipal Court of Chicago. The complaint requested an injunction restraining the sale. (R. 6–7).

The complaint alleged upon information and belief that the debtor was insolvent. (R. 7.) It prayed that the debtor be ordered to file a complete schedule of all its personal property which it owned or thereafter acquired (R. 8) and that a receiver having the usual powers of receivers in chancery be appointed for the property (R. 9). As prayed, the injunction was granted and a receiver appointed to take possession of the property of the debtor, to collect the rents, and to disburse the property under direction of the court. (R. 13.)

Thereafter Carter H. Harrison, Collector of Internal Revenue, filed claims in the proceeding for federal unemployment compensation taxes in the amount of $1,431.16, plus interest, and for federal insurance contribution taxes in the amount

of $522.91, plus interest, due from Chicago Waste and Textile Company. (R. 14–18.) Subsequently, the Collector filed an intervening petition alleging the insolvency of the Chicago Waste and Textile Company and claiming priority of payment for his claims over those of other creditors by virtue of Section 3466 of the Revised Statutes. (R. 18–19.) The answer of the Director of Labor admitted the insolvency but asserted that his own claim was entitled to priority under his lien. (R. 19–21.)

The net amount of $677.81 was realized by the receiver from the property of the debtor and pursuant to order this balance was deposited with the Clerk of the Circuit Court of Cook County, subject to further disposition by the court. (R. 21–22.)

After hearing, the Circuit Court of Cook County ordered that the Director of Labor be given priority as to 90% of the funds on deposit, and that the Collector have priority as to the 10% remaining. (R. 22.)

The Collector appealed (R. 22) and the Supreme Court of Illinois reversed, holding that under Section 3466 of the Revised Statutes, the Collector had priority with respect to his entire claim for federal insurance contribution taxes; and that any balance remaining after payment of these taxes was to be paid to the Director of Labor with provision that the amount be credited by him against the claim of the Collector

for federal unemployment compensation taxes.[1] (R. 42–55.)

SUMMARY OF ARGUMENT

I

For the reasons stated in the first point of the argument of our brief in No. 749, the claims of the United States for federal insurance contributions taxes and federal unemployment compensation taxes due from the debtor for the years 1941 and 1942 are debts due the United States within the meaning of Section 3466 of the Revised Statutes, which provides that when any person indebted to the United States is insolvent, the debts due the United States shall be first satisfied. Although the lower court agreed with this principle, and decreed the prior payment of the insurance contributions taxes, it did not grant priority to the United States with respect to its claim for unemployment compensation taxes, on the theory that in the final distribution of the insolvent debtor's estate, after prior payment of the claim of the United States for federal insurance contributions tax, the receiver must be accorded the right of paying the unemployment contributions

[1] This was the conclusion reached in the modified opinion of the Supreme Court of Illinois, rendered September 17, 1945. (R. 42–55.) An earlier opinion (R. 25–37) was superseded. Both opinions of the court deal also with the companion case, now pending before this Court at No. 749, *People of the State of Illinois, Ex Rel. Robert L. Gordon, Director of Labor* v. *The United States of America.*

due the State of Illinois and of taking a 90% credit against the federal unemployment compensation tax in respect of such payment. While we believe this aspect of the lower court's judgment is erroneous, the United States did not petition for a writ of certiorari with respect thereto.

II

The debtor was insolvent within the meaning of Section 3466. Upon the petition of the State alleging that the debtor was insolvent, a general receiver was appointed to take possession of all the debtor's property and to distribute it as the court might direct. Not only was the allegation of insolvency undenied but the State's complaint shows that the debtor had not paid its debts as they matured. Other circumstances in the case confirm the conclusion that the debtor was insolvent on the date the receiver was appointed.

III

The Supreme Court of Illinois held that the lien of the State for contributions due from the debtor was not so perfected as to defeat the priority of the United States under Section 3466. Insofar as this may be construed as a holding that the State's lien was not perfected, it is a matter of state law and conclusive in this Court.

The holding by the state court that the State's lien was not so specific and perfected as to precede the federal claim is clearly correct. Although

the State filed a suit to foreclose its lien, this did not have the effect of segregating any part of the debtor's assets to satisfy the State's lien. On the contrary, all of the assets of the debtor were transferred to a receiver who held them for distribution as the court might direct. The State did not obtain a judgment of foreclosure or an order entitling it to take the assets. As it had no right to title or possession of any part of the debtor's assets, the State had not perfected its lien on such property.

In any event, the all-inclusive language of Section 3466, coupled with the fact that it is in the public interest for the United States to have priority, compel the conclusion that no lien, even though specific and perfected, should be allowed to defeat the priority granted to the United States by that section.

ARGUMENT

I

FEDERAL INSURANCE CONTRIBUTION TAXES ARE DEBTS WITHIN THE MEANING OF SECTION 3466 OF THE REVISED STATUTES

As in the companion case, No. 749, the principal question in this case is whether a claim of the United States for federal insurance contribution taxes has priority under Section 3466 of the Revised Statutes (Appendix, *infra*, p. 23), over a state claim for unemployment compensation contributions. The Supreme Court of Illinois held

that the claim of the United States for insurance contributions taxes in the amount of $522.91, plus interest, had priority under that section over the claim of the State. (R. 55.) This did not exhaust the amount of $677.81 which was available for distribution, and the Court ordered the balance (something less than $150) distributed to the Director of Labor with directions that the amount paid to the Director be credited on the claim of the United States for unemployment compensation taxes. (R. 55.) The United States did not petition for certiorari with respect to this holding because of the small amount involved.

The federal insurance contributions taxes involved here are for 1941 and 1942 and were imposed by Sections 1400 and 1410 of the Federal Insurance Contributions Act, Chapter 9, subchapter A, Internal Revenue Code (Appendix, *infra*, pp. 23–25), which superseded the taxing provisions of Title VIII of the Social Security Act.

The State of Illinois contends first (Br. 12–28), as in No. 749, that the lower court erroneously held that the claim of the United States for insurance contributions taxes has priority over its claim under Section 3466 of the Revised Statutes on the ground that Congress intended to exclude the federal social security taxes from the scope of Section 3466. We contend that both the insurance contributions taxes and the unemployment taxes are debts due the United States within the meaning of Section 3466 and are entitled to the

priority accorded by that section. Our argument on this question is set out as the first point of the argument in our brief in No. 749, this Term, and is incorporated here by reference.[2]

Although the Supreme Court of Illinois held that federal insurance contributions taxes are entitled to be paid ahead of the state claim under Section 3466, it did not award the balance of the fund to the United States in part payment of its unemployment compensation tax claim. The lower court reached this conclusion, however, not upon the ground that Congress intended to exclude claims for the federal unemployment tax from the scope of Section 3466, but upon the special provisions of Section 602 (b) of the Revenue Act of 1943 (Appendix, *infra*, pp. 26–27). The court construed that section to mean that the receiver was entitled at any time after his appointment to pay the State's claim for contributions and was entitled to a credit on the unemployment compen-

[2] Unlike No. 749 (see footnote 16), there are here involved *employees'* taxes in the amount of $229.91 (R. 15, 17) imposed by Section 1400 of the Internal Revenue Code and required by Section 1401 to be collected by the employer by withholding the amount from the wages of the employees. This amount constitutes a special fund in trust for the United States held by the debtor-employer (Sections 1430 and 3661 of the Internal Revenue Code, Appendix, *infra*, p. 25). Hence, this amount is not part of the debtor's general assets available for distribution to creditors but must be paid to the United States in any event prior to the payment of other claims. Cf. *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, modified, 68 R. I. 358.

sation taxes for 1941 and 1942 claimed by the United States up to 90% thereof. (R. 45.) And its theory was that effect must be given to these rights in the final distribution of the insolvent's assets.

We believe that the portion of the lower court's judgment, holding that the balance of the debtor's assets, after payment of federal insurance contributions tax, be paid to the State, is erroneous. But as heretofore stated, the United States did not petition for certiorari on this point and the question is, therefore, not before the Court.

II

THE DEBTOR WAS INSOLVENT WITHIN THE MEANING OF SECTION 3466 OF THE REVISED STATUTES

The State's second contention (Br. 28–33) is that the Chicago Waste and Textile Company was not insolvent within the meaning of Section 3466 of the Revised Statutes.

As the State asserts, this Court has construed Section 3466 to apply where a debtor who is insolvent has been divested of possession and control of his property in one of the modes specified in the latter part of that section. *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 488–490. It is not contended here that the debtor has made a voluntary assignment of its property or that the estate and effects of an absconding, concealed, or absent debtor have been attached by operation

of law. However, it is contended that an act of bankruptcy was committed as defined in Section 3 of the Federal Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended (11 U. S. C. 1940 ed., Sec. 21 (a)) as follows:

> Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; * * *.

The complaint of the Director of Labor, which initiated this proceeding, alleged that the Chicago Waste and Textile Company owed unemployment contributions to him which it had failed to pay upon demand (R. 4); that the Director had a lien for such unemployment contributions upon all personal property of the debtor, used in its business (R. 4–5); that it was alleged upon information and belief that the debtor was insolvent and that the personal property subject to his lien was "scant security" for the debt due him[2] (R. 7). The complaint alleged also that one judgment creditor of the debtor was about to satisfy its judgment by sale of the debtor's personal property at public auction, and that certain other persons also had an interest in the debtor's property. (R. 6–7.) The complaint

[2] These have been said to be essential allegations where a receiver is sought. *Gleinnon* v. *Wilcox*, 159 Ill. App. 42; 26 A. L. R. 50n.

prayed for an injunction against sale of the property by the judgment creditor and against any interference with the debtor's property by all other creditors generally. (R. 7–8.) It asked (R. 9):

> That a receiver be appointed for said property, and the rights thereto, upon the filing of this complaint, with the usual powers of Receivers in Chancery, to take and have immediate possession of said property, and to collect the rents, issues and profits arising out of said property, and disburse the same under the order and direction of this Court.

It also prayed that the Director be paid the amount of his claim against the debtor; and, if necessary, that the debtor's property be sold to satisfy the amount due to him, and that the balance of the debtor's property, if any, be paid to such parties as the court should find to be entitled thereto. (R. 9.)

The Circuit Court of Cook County granted the injunction and appointed a (R. 13) "receiver for the property of the Chicago Waste and Textile Company; to take immediate possession of said property, collect rents and to disburse same under order and direction of the Court." It further directed him (R. 13) "to take possession of the premises and the business, property and assets contained therein located at 1234 North

Halsted Street, Chicago, Illinois."' It is thus apparent that the receiver was appointed as a result of the State's allegation that the debtor was insolvent and that a general equity receivership was established, in which all the debtor's assets were to be liquidated and the rights of all creditors were to be adjudicated. As this Court observed in *United States* v. *Emory*, 314 U. S. 423, 426:

> It is agreed that the St. James Distillery was insolvent "on or before August 1936" [the time of the filing of the creditor's petition] and that in response to a creditor's petition a receiver was appointed to liquidate the corporate assets. The appointment of a receiver under such circumstances is among the most common examples of an "act of bankruptcy."

See also *Price* v. *United States*, 269 U. S. 492, and *United States* v. *Butterworth Corp.*, 269 U. S. 504.

The foregoing cases involved petitions by unsecured general creditors but in *United States* v. *Texas*, 314 U. S. 480, it was held that the appointment of a receiver upon the petition of a mortgage creditor constituted an act of bankruptcy. There a creditor holding a demand note secured by a chattel mortgage filed an action against his debtor alleging the debtor's insolvency and praying that judgment be entered in his favor for

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[1] In the absence of statute, there is no authority to appoint a receiver *pendente lite* in a tax foreclosure suit. *People* v. *Straus*, 266 Ill. App. 95, 109–113, affirmed, 355 Ill. 640.

the amount of the note, that the mortgage be foreclosed, and that a receiver be placed in charge of all the property of the debtor. The Court said (pp. 483–484):

> Here the district court expressly found that Nix was insolvent, and it appointed a receiver. It is true that the original petition was filed by a mortgagee rather than by a general creditor. But, if any limitations upon the operation of § 3466 might otherwise have flowed from this circumstance, they were removed by the subsequent character of the proceeding. The receiver was placed in control of all of Nix's assets, rather than only those subject to the mortgage, and all the assets were eventually liquidated. Parties other than the mortgagee, including Texas itself, intervened and were heard. We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466.

In the case at bar also, the receiver pursuant to court order, as has been seen, took charge of all the debtor's property and liquidated it, as in a general equity receivership. All creditors had the right of intervention and the Collector in fact utilized this right to assert his claim for payment of federal taxes. (R. 18–19.) These facts clearly stamp this as a general equity receivership. *Cf. Duparquet Co.* v. *Evans*, 297 U. S. 216.

Thus, the debtor permitted the appointment of a receiver, and under the definition contained in

Section 3 of the Bankruptcy Act, quoted above, p. 11, this constituted an act of bankruptcy if the appointment occurred while the debtor was insolvent or unable to pay its debts as they matured.

Although the Circuit Court of Cook County made no express finding of insolvency, it appointed a receiver pursuant to the State's allegation of insolvency.[5] So far as the record shows, this allegation has never been denied by the debtor. Moreover, the complaint showed that there was an unpaid judgment creditor who had seized the debtor's property and was about to sell it when the complaint was filed, and that the debtor had failed to pay upon demand the unemployment contributions due the State. These facts, together with the State's own undenied allegation of insolvency, are certainly conclusive that the debtor was insolvent and unable to pay its debts as they matured at the time the receiver was appointed. Furthermore, the intervening

[5] We do not discuss the State's assertion (Br. 31) that Section 3, Clause (5), of the Bankruptcy Act contemplates a receivership involving a liquidation of all the debtor's property and not merely a receivership to aid a lienholder in realizing on his lien, since the receivership here was general. However, this Court reserved decision on this point in *Duparquet Co.* v. *Evans*, *supra*, p. 224. See also *United States* v. *Texas*, *supra*. The language of the Bankruptcy Act does not require in terms a general receivership and it seems doubtful that a court can properly read into the language that requirement. But see *contra*, *Elfast* v. *Lamb*, 111 F. 2d 434 (C. C. A. 2d), and cases there cited.

petition of the Collector alleged insolvency (R. 18) and this was admitted by the State (R. 20). And, finally, the receiver realized only the amount of $677.81 from all the debtor's property (less than the State's claim alone), a fact which convincingly illustrates that the debtor's assets, fairly valued, were insufficient to pay its debts, when the receiver was appointed.

III

THE PRIORITY ACCORDED THE CLAIMS OF THE UNITED STATES UNDER SECTION 3466 IS NOT DIVESTED BY THE STATE'S LIEN

The State contends (Br. 34–43) that its lien was so specific and perfected as to defeat the priority of the claim of the United States for insurance contributions taxes under Section 3466, even if it is held that the federal claim is entitled to priority under that section.

(1) The Supreme Court of Illinois held that the State did not have such a lien upon the assets of the insolvent debtor under Section 26 (a) of the Illinois Unemployment Compensation Act (Appendix, *infra*, p 27) as to give it priority of payment over the claim of the Federal Government for insurance contribution taxes under Section 3466. (R. 55.) Insofar as this may be construed as a holding that the lien of the State was not specific and perfected under State law, it is conclusive in this Court. Cf. *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v.

Knott, 298 U. S. 544. As was said in *Spokane County* v. *United States*, 279 U. S. 80, 94–95:

> From the judgment of the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a state question. * * *
>
> * * * * *
>
> Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the State, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it.

The State complains (Br. 41–43) that the lower court did not consider the facts in reaching its conclusion that the State's lien was not specific enough to defeat the priority of the United States. At the beginning of its opinion the court stated the facts of the case (R. 42–43), and although it did not repeat them in connection with its discussion of the effect of the State's lien, its decision must have been reached upon the basis of the facts, particularly since the State argued below that it had perfected its lien by filing suit to foreclose. There can be no doubt that the lower court intended its holding that the lien lacked specificity to apply to this case, as well as the companion case, No. 749, since its con-

clusion is expressly stated with respect to both cases. (R. 55.)

(2) The State's statutory lien alone was nothing more than an inchoate general lien. *United States* v. *Texas*, 314 U. S. 480; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Waddill Co.*, 323 U. S. 353. The State contends, however (Br. 40–41), that its lien became specific and perfected by reason of the fact that it filed a suit to foreclose its lien and that custody of the debtor's property was placed in a receiver's hands. We think that the Supreme Court of Illinois correctly concluded that these facts do not show that the State had perfected its lien sufficiently to divest the priority of the United States.

The filing of the suit to foreclose the lien did not convert the State's lien from a general lien on all the debtor's assets used in its business to a specific lien on the assets or any part thereof. In its complaint the State merely asked the court to make its lien specific by giving it a judgment and setting apart sufficient of the debtor's assets to satisfy the lien. The suit itself did not segregate any part of the debtor's assets for the use of the State, nor did it effect a transfer of title or possession of any part of the debtor's property to the State.

Upon the appointment of the receiver, the priority of the claim of the United States attached. *Spokane County* v. *United States*, 279 U. S. 80, 93; *United States* v. *Oklahoma*, 261 U. S.

253, 260. Prior to this time the State had not obtained a judgment in foreclosure nor had it attached or distrained upon any particular property. It therefore had not perfected its lien before the priority of the United States attached; as before the suit was instituted, it had only a general lien which had not fastened upon any particular property of the debtor.

Although, upon his appointment, the receiver did acquire the possession of the debtor's property (R. 13), his custody did not divest the debtor of title. The debtor retained title until the court ordered the receiver to distribute the property to the proper claimant.[6]

Possession of the debtor's property by the receiver of course cannot be construed as vesting possession in the State. The receiver was an officer of the Court, not an agent of the State. Until it obtained a judgment, or a court order, the State had no right to take possession of any part of the debtor's property held by the receiver. Its claim to possession was no more perfected than that of other creditors.

The amount of the State's lien was fixed, it is true, but this fact alone has never been regarded by this Court as making a lien specific as to any particular property of the debtor. The State here did not acquire the title to, or possession of,

[6] A receiver stands in the shoes of the debtor, like a trustee in bankruptcy. *Chicago Title & Tr. Co.* v. *Storage Co.*, 260 Ill. 485, 496; Illinois Attorney General's Opinions, 1939, No. 117, p. 324.

the debtor's property, nor did it obtain a severance of any property from the general assets of the debtor, from which it could satisfy its lien. This Court has repeatedly indicated that one of these things at least would be essential, as a minimum requirement, to consider a statutory lien so specific and perfected as to cast any doubt on the federal priority. *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Texas*, 314 U. S. 480; *United States* v. *Knott*, 298 U. S. 544; *New York* v. *Maclay*, 288 U. S. 290; *Spokane County* v. *United States*, 279 U. S. 80.

It follows that the Supreme Court of Illinois correctly held that under the facts in this case the State had not perfected its lien prior to the time when the priority of the United States attached and, consequently, that the claim of the United States was supreme under Section 3466.[7]

(3) The question has always been reserved by this Court as to whether the priority of the United States under Section 3466 might be defeated by a perfected specific lien upon the property at the time of insolvency. *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Texas*, 314 U. S. 480; *New York* v. *Maclay*, 288 U. S. 290; cf. *Michigan* v. *United States*, 317 U. S. 338. If this Court should be of the opinion that the State had perfected its lien, despite the fact

[7] The Director's claim did not satisfy the accepted requirements for a "consummated lien." Illinois Attorney General's Opinions, 1939, No. 37, p. 135, 139–140.

that it had not title to or possession of the debtor's property and despite the fact that it had not attached or distrained or procured a judgment enabling it to satisfy its lien from the debtor's property, then we urge that in no event can the priority of the United States be defeated by a perfected lien.

As the Court has frequently recognized, Section 3466 of the Revised Statutes is all-inclusive and on its face admits of no exception to the priority of claims of the United States in the distribution of an insolvent estate. The Court, however, has made an exception in the case of previously executed mortgages (*Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596; *Savings Society* v. *Multnomah County*, 169 U. S. 421) on the theory that the mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor. *United States* v. *Texas*, *supra*, pp. 484–485. In view of the absolute language of Section 3466, the propriety of allowing the claims of mortgagees ahead of claims of the United States, in the distribution of an insolvent estate was at best doubtful, but in any case it is plain that the priority of the United States is not to be subordinated to any outstanding lien, no matter how specific such lien may have become prior to the institution of insolvency proceedings. As was pointed out in *New York* v. *Maclay*, 288 U. S. 290,

294, a lien holder is much less an *owner* of specific property than is a mortgagee. Accordingly, the fiction upon which the mortgage cases rest—i. e., that the mortgaged property is not the property of the mortgagor since title has been conveyed to the mortgagee—is inapplicable here; for, on any theory, assets subject to a lien continue to be the property of the debtor until the lien is foreclosed.

In insolvency proceedings, some claimants are certain to suffer. However, there is no reason why lien-holders should be preferred over the United States. Since the priority accorded claims of the United States is for the purpose of securing revenue for the public benefit, the United States has a stronger argument for prior payment of its claims against an insolvent estate than does a lien-holder whose interest is purely private. And even where a State holds the lien, its interest, although of a public nature, is subordinate to the wider public interest involved in a claim of the United States. This conclusion is implicit in those decisions of this Court holding that a state may not by its own laws impair the priority of the United States. *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290, 291–292. In a contest between the holder of a perfected lien and the United States, therefore, we believe that the all-inclusive language of Section 3466 requires that the issue be resolved in favor of according priority to claims of the United States.

CONCLUSION

In view of the foregoing, the United States is entitled to prior payment of its claims for insurance contributions taxes under Section 3466 of the Revised Statutes. The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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MARCH, 1946.

APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C. 1940 ed., Sec. 191.)

Internal Revenue Code:

SEC. 1400 [as amended by Section 601 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360]. RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

(2) With respect to wages received during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(3) With respect to wages received during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(4) With respect to wages received after December 31, 1948, the rate shall be 3 per centum.

(26 U. S. C. 1940 ed., Sec. 1400.)

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

(b) *Indemnification of Employer.*—Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1401.)

SEC. 1410 [as amended by Section 604 of the Social Security Act Amendments of 1939, *supra*]. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

(2) With respect to wages paid during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(3) With respect to wages paid during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

(4) With respect to wages paid after December 31, 1948, the rate shall be 3 per centum.

(26 U. S. C. 1940 ed., Sec. 1410.)

SEC. 1430 [as amended by Section 903 of the Social Security Act Amendment of 1939, *supra*]. OTHER LAWS APPLICABLE.

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 or section 1800, and the provisions of section 3661, shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter.

(26 U. S. C. 1940 ed., Sec. 1430.)

SEC. 3661. ENFORCEMENT OF LIABILITY FOR TAXES COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

(26 U. S. C. 1940 ed., Sec. 3661.)

Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 602. CREDIT AGAINST FEDERAL UNEMPLOYMENT TAXES FOR YEARS 1936 TO 1942.

* * * * *

(b) *Allowance of Credit Against Tax for 1939, 1940, 1941, and 1942 Where Assets in Control of Court.*—Against the tax imposed by the Federal Unemployment Tax Act for the calendar year 1939, 1940, 1941, or 1942, any taxpayer shall be allowed credit for the amount of contributions paid by him into an unemployment fund under a State law, without regard to the date of payment, if the assets of the taxpayer were, at any time during the period from the last day upon which the taxpayer was required under section 1604 of the Federal Unemployment Tax Act to file a return of the tax against which credit is claimed to June 30 next following such last day, inclusive, or (in the case of credit against the tax for the calendar year 1939) the period October 9, 1940, to December 6, 1940, inclusive, or the period September 21, 1941, to November 18, 1941, inclusive, or (in the case of credit against the tax for the calendar year 1940) the period September 21, 1941, to November 18, 1941, inclusive, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction. The provisions of the Federal Unemployment Tax Act (except section 1601 (a) (3)), including such provisions as modified by section 902 (e) of the Social Security Act Amendments of 1939, shall apply to allowance of credit under this subsection. The terms used in this subsection shall have the same meaning as when used in the Federal Un-

employment Tax Act. The total credit allowable against the tax imposed by such Act for the calendar year 1939, 1940, 1941, or 1942 shall not exceed 90 per centum of such tax.

* * * * *

Illinois Unemployment Compensation Act (Jones Illinois Statutes Annotated (1944), Sec. 45.154):

SEC. 26. (a) Lien created upon assets of employer — Commencement — Limitations. A lien is hereby created in favor of the Director upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be for a sum equal to the amount at any time due from such employer to the Director on account of contributions, interest and penalties thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. In all cases where a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that the determination and assessment of the Director made pursuant to the provisions of this Act became final.

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SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1946.

People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner, *v.* Nigel D. Campbell, Collector of Internal Revenue.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 23, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case was companion to *Illinois ex rel. Gordon* v. *United States*, 328 U. S. —, decided last term, but brings for settlement other problems raised by a conflict of claims between the United States and the State of Illinois. The conflict concerns whether one or the other claimant is entitled to priority of payment from assets of a common debtor. The Illinois Supreme Court dealt with both cases in a single opinion. 391 Ill. 29. Certiorari was granted in each. 327 U. S. 771; 327 U. S. 772. On the same day that *Illinois ex rel. Gordon* v. *United States, supra*, was decided this case was restored to the docket and assigned for reargument before a full bench, 328 U. S. —, because of the presence of the questions not determined by that decision.

The controversy arose on June 29, 1942, when the Director of Labor of Illinois brought suit in the Circuit Court of Cook County, Illinois, to enforce against the Chicago Waste and Textile Company a statutory lien for unemployment compensation contributions due the state. Associated Agencies, Inc.,[1] was a creditor of the Chicago

[1] Associated Agencies was made a defendant in the suit brought by the Director of Labor.

Waste and Textile Company. In his complaint the Director alleged that Associated Agencies had obtained a judgment against its debtor in the Municipal Court of Chicago and that execution had issued on this judgment June 3, 1942, but that the interest of Associated Agencies was subordinate to that of the lien sought to be foreclosed. This, "for the reason that the execution upon said judgment was issued long after notice of the lien of the Director of Labor was recorded with the Recorder of Deeds." [2] The Director alleged further upon information and belief that the Chicago Waste and Textile Company was insolvent and that "the personal property subject to the lien herein being foreclosed, is scant security for the debt due the Director of Labor . . . and that unless a receiver be appointed for all of said property, pending a full and complete hearing upon the issues herein, the plaintiff will suffer financial loss and said property will be wasted."

Granting the immediate relief requested, the Circuit Court enjoined all creditors of the Chicago Waste and Textile Company from interfering with the property of the company, whether by judicial action [3] or otherwise, and also appointed a receiver "for the property of the Chicago Waste and Textile Company."

Subsequently respondent, the Collector of Internal Revenue for the First District of Illinois, filed claims on behalf of the United States amounting to $1,954.07 plus interest. Of this amount, $522.91 was for federal insurance contribution taxes and $1,431.16 was for federal unemployment taxes. Of the federal insurance contribution taxes,

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[2] As exhibits to the Director's complaint three notices of lien were filed, one for $225.51, one for $303.29, and one for $259.65. Although these aggregate $788.45, the lien sought to be foreclosed was for $767.29. See note 12.

[3] The property of the Chicago Waste and Textile Company was to be sold at public auction at the behest of Associated Agencies. The injunction prevented this sale.

$229.91 represented employees' taxes, see *Helvering* v. *Davis*, 301 U. S. 619, collected by the employer under statutory withholding provisions. I. R. C. §§ 1400, 1401. The Collector also filed an intervening petition, alleging that the debtor was insolvent and asking that the claims of the United States be allowed as claims entitled to priority of payment immediately after costs of administration and before payment of other creditors. The Director of Labor answered, denying that the claims of the United States were entitled to priority over the claims of Illinois.

The receiver realized $677.81 from sale of the debtor's property and this amount was deposited with the clerk of the Circuit Court. A hearing was held, and the court ordered that ninety per cent of the funds on deposit be given to the Director of Labor and the other ten per cent to the United States. The Collector appealed to the Appellate Court for the First District. On motion of the appellee, the cause was transferred to the Supreme Court of Illinois on jurisdictional grounds.

The state Supreme Court held that the United States was entitled to priority over the State of Illinois as to its claim for federal insurance contribution taxes.[1] Whether it was correct to award this priority is the issue we now have to decide.

Illinois ex rel. Gordon v. *United States*, 328 U. S. —, held that in circumstances which called into application Rev. Stat. § 3466, 31 U. S. C. § 191, the claims of the United States for federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620, 636, and

[1] This did not exhaust the fund, and the court awarded the balance to the Director of Labor, instead of to the United States in part payment of its claim for federal unemployment taxes. 391 Ill. 29, 32–34. See also *United States* v. *Spencer*, 65 F. Supp. 763. The United States has not petitioned for certiorari, and therefore the correctness of this disposition of the balance of the fund is not now in controversy.

for federal unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat. at 639, had priority over claims of Illinois for taxes under its Unemployment Compensation Act.[5] That decision is controlling, of course, upon the same feature of this case, although the federal insurance contributions taxes claimed by the United States arise under the 1939 amendments of the Social Security Act, rather than, as in the case last term, under the original act itself. Compare §§ 801, 802, 804, 807 (c) of the original Social Security Act, 49 Stat. 620, with §§ 1400, 1401, 1410, and 1430 of the Internal Revenue Code, 53 Stat. 175 as amended by 53 Stat. 1381.

I

But the state urges that § 3466 does not apply in the facts of this case. This argument, as well as another, that the lien of the state was so specific and perfected as to defeat the priority, if any, of the United States under Rev. Stat. § 3466, must be met before the case can be affirmed on the authority of *Illinois ex rel. Gordon* v. *United States*, *supra*.

[5] Jones Ill. Stat. Ann. (1944) §§ 45.128–45.161. The argument of the state in that case was that, since Title 9 contained "provisions intended to induce states to set up sound unemployment compensation in accordance with Congressionally prescribed standards" and "to this end" permitted the states "to build up their own funds by collection from employers within the state of 90% of the tax those employers would otherwise have to pay to the federal government," it was Congress' intention to give states priority over the United States for their unemployment compensation claims. This argument was applicable, it may be noted, only to federal unemployment compensation taxes and not to federal insurance contributions taxes which are the only ones involved in this case, since as to federal insurance contributions taxes there are no provisions for federal-state cooperation as there are in Title 9. Compare *Helvering* v. *Davis*, 301 U. S. 319, with *Steward Machine Co.* v. *Davis*, 301 U. S. 548. See also *Rivard* v. *Bijou Furniture Co.*, 68 R. I. 358, 361.

Rev. Stat. § 3466 provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The fifth act of bankruptcy, which is the one on which the Government relies as having brought § 3466 into operation, consists of a person's [6] having,

> "(5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property." 52 Stat. 844, 11 U. S. C. § 21 (a).

The state contends, first, that the receiver appointed at its instance was not a receiver within the meaning of this provision and, second, that the Chicago Waste and Textile Company was not shown by the record to be insolvent.

This Court has noted that the view has been expressed that to satisfy the fifth act of bankruptcy "the receivership must be general, as contrasted with a receivership incidental to the enforcement of a lien." *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 224.[7] It has not determined the correctness of that view, *Emil* v. *Han-*

[6] The Bankruptcy Act uses the term "person," 11 U. S. C. § 21 (a), but the Act defines "persons" as including "corporations, except where otherwise specified, and officers, partnerships, and women. . . ." 52 Stat. 841, 11 U. S. C. § 1 (23).

[7] Since decision of the *Evans* case, the fifth act of bankruptcy has been amended to include appointment of a receiver when there is insolvency in the equity sense as well as in the bankruptcy sense. See

ley, 318 U. S. 515, 521, n. 5, nor need we do so now. For, though the receiver was appointed at the instance of a secured creditor, as in *United States* v. *Texas*, 314 U. S. 480, 483–484, "any limitations upon the operation of § 3466 [which] might otherwise have flowed from this circumstance . . . were removed by the subsequent character of the proceeding." The receiver was placed in control of all the assets of the Chicago Waste and Textile Company, and all of the assets were liquidated. At least one party other than the secured creditor which had instituted the proceeding, namely, the United States, was allowed to intervene and was heard. "We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466." *United States* v. *Texas*, *supra*.

Moreover, it is questionable whether the fact of insolvency is properly contestable by the State of Illinois. The receiver was appointed upon the allegations of its complaint, which included insolvency, and the state admitted in its answer to the Government's intervening petition that the debtor was insolvent. Although ordinarily the doctrine of estoppel or that part of it which precludes inconsistent positions in judicial proceedings is not applied to states,[8] in the present litigation Illinois is in the position of any lien creditor.

It would seem therefore that in these circumstances the state should be held estopped to contest insolvency. But in any event the record demonstrates that the debtor was insolvent at the time of the appointment of the receiver, for when its property was liquidated there was not enough to satisfy the claims of the two contesting creditors at the bar.

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1 Collier on Bankruptcy (14th ed.) 475. But under the amended statute the same view has been expressed. *Elfast* v. *Lamb*, 111 F. 2d 434, 436.

[8] See Note (1946) 59 Harv. L. Rev. 1132, 1136.

Thus, the fifth act of bankruptcy was committed and in consequence the United States has the benefit of the priority given it by Rev. Stat. § 3466. We therefore turn to the argument of the state that the specificity of its lien defeated this priority.

II

The United States was given the priority, now incorporated in Rev. Stat. § 3466, in 1797. 1 Stat. 515.[9] See also the discussion in *Price* v. *United States*, 269 U. S. 492, 500–501. Yet the Court has never decided whether the priority is overcome by a fully perfected and specific lien. See Rogge, The Differences in the Priority of the United States in Bankruptcy and in Equity Receiverships (1929), 41 Harv. L. Rev. 251, 267–270. The question, however, has been reserved many times in express terms. See *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 442; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611–612; *Spokane County* v. *United States*, 279 U. S. 80, 95; *United States* v. *Maclay*, 288 U. S. 290, 294; *United States* v. *Texas*, 314 U. S. 480, 485–486; *United States* v. *Waddill Co.*, 323 U. S. 353, 355.[10] And again we need not decide it, for we are of the opinion that the Illinois lien was not sufficiently specific or perfected, in the purview of controlling decisions, to defeat the Government's priority.

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[9] There are minor differences in phraseology between 1 Stat. 515 and Rev. Stat. § 3466, which "did not work any change in the purpose or meaning. . . ." *Price* v. *United States*, 269 U. S. 492, 501.

[10] The statement in *United States* v. *Knott*, 298 U. S. 544, 551, that "such an interest [an inchoate general lien created by the laws of Florida] lacks the characteristics of a specific perfected lien which alone bars the priority of the United States" was not intended to settle the problem and may be taken to have been made with reference to the early mortgage lien cases discussed and distinguished in *United States* v. *Texas*, 314 U. S. at 484–485, and *New York* v. *Maclay*, 288 U. S. at 293–294.

The effect and operation of a lien in relation to the claim of priority by the United States under Rev. Stat. § 3466 is always a federal question. "The priority given the United States cannot be impaired or superseded by state law." *United States* v. *Oklahoma*, 261 U. S. 253, 260. Hence a state court's characterization of a lien as specific and perfected is not conclusive. *United States* v. *Waddill Co.*, 323 U. S. 353, 357. The state characterization, though entitled to weight, is always subject to reexamination by this Court.

On the other hand, if the state court itself characterizes the lien as inchoate, this characterization is practically conclusive. "Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the state, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it." *Spokane County* v. *United States*, 279 U. S. 80, 95; cf. *United States* v. *Knott*, 298 U. S. 544.

In this case the United States argues that the Illinois Supreme Court judged the lien of the state inchoate and that therefore we may affirm its judgment on this basis. Illinois, however, disputes this reading. It states that the Illinois court did not consider the nature of the lien in relation to the facts presented by this case, but merely determined that under the facts of *Illinois ex rel. Gordon* v. *United States*, *supra*, the lien had not become choate. We can hardly accept this view in the face of the judgment rendered and the opinion's statement of the facts of this case at the outset, together with the later explicit reference to it in holding the lien not of a sort to defeat the federal priority. But we do not stop to analyze the opinion of the Supreme Court of Illinois in detail. For it is clear, quite apart from the opinion, that the lien was not so specific and perfected as to defeat the priority of the United States, if that is at all possible.

The statute under which the Illinois lien arises is set out in the margin.[11] The state asserts that the lien became specific and perfected when notice of lien had been filed and recorded [12] and when the receiver had been appointed. In its view, upon appointment of the receiver "all substantial aids to the enforcement of the state's lien had been utilized."

With this conclusion we do not agree. It is true that the filing of notice of lien determined the amount of the lien, though the state may have computed wrongly the amount of taxes owed it.[13] See *United States* v. *Waddill Co.*, 323 U. S. at 357–358. But it is not enough that the amount of the lien be known. The lien must attach to

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[11] "A lien is hereby created in favor of the Director *upon all the personal property or rights thereto owned or thereafter acquired by any employer and used by him in connection with his trade, occupation, profession or business*, from whom contributions, interest or penalties are or may hereafter become due. Such lien shall be *for a sum equal to the amount at any time due* from such employer to the Director *on account of contributions, interest and penalties* thereon. Such lien shall attach to such property at the time such contributions, interest or penalties became, or shall hereafter become, due. In all cases where a report setting forth the amount of such contributions has been filed with the Director, no action to enforce such lien shall be brought after three years from the date of the filing of such report and in all other cases no action to enforce such lien shall be brought after three years from the date that the determination and assessment of the Director made pursuant to the provisions of this Act became final." Jones Ill. Stat. Ann. (1944) § 45.154 (a). (Emphasis added.) See also note 2.

[12] "Such lien shall be invalid only as to any innocent purchaser for value of stock in trade of any employer in the usual course of such employer's business, and shall be invalid as to any innocent purchaser for value of any of the other assets to which such lien has attached, unless notice thereof has been filed by the Director in the office of the Recorder of Deeds of the county within which the property subject to the lien is situated. . . ." Jones Ill. Stat. Ann. (1944) § 45.154 (b) (1). See note 2.

[13] Cf. note 2.

specific property of the debtor. This the Illinois lien had not done at the time the receiver was appointed.[14] Indeed, as was stated at the argument, not only was the property not in the hands of the bailiff, but so far as appears the amount or type of property belonging to the debtor was not known to the state.

Under the Illinois law, where it is sought to foreclose a lien for unemployment compensation taxes it is not necessary for the Director in his complaint to describe the property to which said lien has attached.[15] On the contrary by express provision,

> ". . . it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, *of all personal property and rights thereto which he owned at the time the contributions*, upon which the lien sought to be foreclosed is based, *become due, or which he subsequently acquired, indicating* upon such schedule the property so owned by such employer *which was, or is used* by such employer *in connection with his trade, occupation, profession or business*, and if such employer shall so fail to do after having been so ordered by the court, he may be punished as in other cases of contempt of court." Jones Ill Stat. Ann. (1944) § 45.154 (e). (Emphasis added.)

Not until the debtor has filed the required schedules[16] would the state know the amount of property in the

[14] The priority of the United States attaches upon appointment of the receiver. *United States* v. *Oklahoma*, 261 U. S. 253, 260; *Spokane County* v. *United States*, 279 U. S. 80, 93.

[15] Jones Ill. Stat. Ann. (1944) § 45.154 (e) provides for enforcement of the lien by judicial proceedings for foreclosure. The section states: "In all such cases, it shall not be necessary that said petition describe the property to which said lien has attached"; and continues with the further language quoted in the text.

[16] In his complaint the Director of Labor prayed, "that an order be entered by this Honorable Court commanding that the defendant, Chicago Waste & Textile Co., a corporation, file within a short day to be fixed by the Court, a full and complete schedule under oath,

debtor's possession or, more important, the property to which the lien attached. For the lien attaches only to personal property used by the employer "in connection with his trade, occupation, profession or business. . . ."

The appointment of a receiver, then, was only an initial step in the perfection of the lien. It, together with the injunction, protected whatever rights in the property the state might have. But it was not a final assertion or attachment of rights to specific property, as is, for example, the enforcement of a judgment by execution and levy. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 443–444.

The state has not relied merely upon the recording of the notices of lien but has rested on this together with the receiver's appointment as accomplishing the required specificity and perfection. But now it is said the filing of the notices alone achieved this result. Neither view is correct. Both have been repudiated by repeated decisions of this Court, the latest being *United States* v. *Waddill Co.*, *supra*.

It has never been sufficient to show merely a general lien, effective to protect the lienor against others than the Government, but contingently on taking subsequent steps either for giving public notice of the lien or for enforcing it.[17] *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 444; *United States* v. *Waddill Co.*, *supra*. The federal priority is not destroyed by state recording acts any more than by state statutes creating or otherwise affecting liens, if the lien as recorded or otherwise executed does not have the required degree of specificity and perfection. Under the decisions the test is not, and cannot be, simply whether by his taking

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of all personal property and rights thereto, which it owned on the 1st day of May, 1941, or thereafter acquired, and to indicate upon such schedule the property so owned by it which was or is used by it in connection with its trade, occupation, profession or business."

[17] See the authorities cited in the text at the beginning of Part II of this opinion.

further steps, the lienor's rights will be enforced against others than the Government.

The long established rule requires that the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States* v. *Knott*, 298 U. S. 544, 549–551; (2) the amount of the lien, *United States* v. *Waddill Co.*, 323 U. S. at 357–358; and (3) the property to which it attaches, *United States* v. *Waddill Co., supra; United States* v. *Texas, supra; New York* v. *Maclay, supra.* It is not enough that the lienor has power to bring these elements, or any of them, down from the broad generality to the earth of specific identity.

In this case the identity of the lienor was made certain, before the Government's priority attached, both by the statute and by the notices of lien. The latter also fixed the amounts of the liens, though miscalculated. But neither the notices of lien nor the appointment of the receiver made definite and certain the property, as we have shown.

Here, as in *United States* v. *Texas*, 314 U. S. at 487, ". . . 'property devoted to or used in his business' is neither specific nor constant." As in *United States* v. *Waddill Co.*, 323 U. S. at 359, the goods subject to the lien had not "severed themselves from the general and free assets of the tenant [owner] from which the claims of the United States were entitled to priority of payment." Here, as in that and other cases, there was "merely a *caveat* of a more perfect lien to come," *New York* v. *Maclay*, 288 U. S. at 294, whether tested by state law, 323 U. S. at 357, or by perfection "as a matter of fact, regardless of how complete it [the lien] may have been as a matter of state law." *Ibid*, 358. The state has acquired neither title nor possession, *Thelusson* v. *Smith*, 2 Wheat. 396; *New York* v. *Maclay*, 288 U. S. at 290, since the receiver's pos-

session was that of the court, not of the state; and did not sever the property from the debtor's general assets as of the crucial date.

To permit the recording of the notices or the receiver's appointment, or both, in circumstances like these, to overcome the Government's priority would be in substance to overrule the numerous decisions cited in which liens no less "specific and perfected" have been held impotent for that purpose. It would open the door, too, we think, to substantial nullification of the Government's priority. For then this could be accomplished simply by recorded notices of lien, disclosing claims to property not segregated from the debtor's general estate; designated only by general words of classification, including after acquired property as here; and ascertainable definitively only by further procedures. Congress alone should make such a change, if it should be made at all.

The judgment is affirmed.[18]

[18] As we affirm the judgment on the ground that the United States under Rev. Stat. § 3466 has priority over Illinois as to all federal insurance contributions taxes owing it, we do not consider the argument that even if this general priority did not exist, the United States would be entitled to the amount of the fund which represents employees' taxes.

SUPREME COURT OF THE UNITED STATES

No. 35.—October Term, 1946.

People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner.
v.
Nigel D. Campbell, Collector of Internal Revenue.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 23, 1946.]

Mr. Justice Reed, dissenting.

In my opinion the notices of lien caused to be duly recorded by Illinois on April 3, May 8 and May 20, 1942, with the Recorder of Deeds of Cook County, Illinois, perfected and made specific the state's claim under its unemployment compensation statute. These notices named the creditor and gave his precise address. They stated the amount of the claim and asserted a lien for the aggregate sum upon all the personal property owned and used by the lienee in connection with its business. Under any view of chattel lien law, such a legally recorded instrument would create a lien in the lienor on the personal property owned and used by the taxpayer at his place of business superior to the rights of general creditors or subsequent innocent purchasers for value. This is true by statute in Illinois. Jones Ill. Stat. Ann. (1944) § 45.154 (b) (1), Unemployment Compensation Act of Illinois.

The Court deems that the lien attaches to specific and ascertainable property of the taxpayer only when the taxpayer files his schedule of property in proceedings to enforce the lien.[1] I deem the recorded notice as the incident that consummates the lien upon the specific and ascertainable property. The enforcement proceedings after that recordation are only an enforcement of a lien already fixed upon the specific property adequately described in the recorded notice.

[1] Jones Ill. Stat. Ann. (1944) § 45.154 (e):

"Foreclosure of lien. In addition and as an alternative to any other remedy provided by this Act, or by the laws of the State of

The Court suggests that the ruling in *United States* v. *Texas*, 314 U. S. 480, that the statutory lien on "property devoted to or used in his business" is not a specific and fixed lien entitled to priority over the United States, is persuasive that similar words in the Illinois statute are not specific and constant. But in the *Texas* case, no steps had been taken to fix the amount of the lien on the property devoted to the business, p. 487. Of course, therefore, the lien could not be fixed and certain. This final step to perfect the lien had been taken in the present case.

As the Court concludes no specific lien attaches to ascertainable property, I content myself with adding, as to the respective priorities of the United States and a lienor with a specific lien on ascertainable property, that in my opinion such a lienor has priority for his lien despite Rev. Stat. § 3466. See *Thelusson* v. *Smith*, 2 Wheat. 396, 424; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 441; *United States* v. *Waddill Co.*, 323 U. S. 353, 355.

MR. JUSTICE JACKSON joins in this dissent.

Illinois the Director may enforce the lien herein created by petition in the name of the People of the State of Illinois to the Circuit Court of the county wherein the property subject to the lien is situated, praying that the lien which has attached to said property, be foreclosed and the aforesaid property be sold in the same manner as in cases of foreclosure of mortgages upon personal property in courts of record. In all such cases, it shall not be necessary that said petition describe the property to which said lien has attached and it shall be the duty of the employer against whom such petition has been filed to file in said proceedings, a full and complete schedule, under oath, of all personal property and rights thereto which he owned at the time the contributions, upon which the lien sought to be foreclosed in [is] based, become due, or which he subsequently acquired, indicating upon such schedule the property so owned by such employer which was, or is used by such employer in connection with his trade, occupation, profession or business; and if such employer shall so fail to do after having been so ordered by the court, he may be punished as in other cases of contempt of court."